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INTRODUCTION

TO

EQUITY JURISPRUDENCE,

ON THE BASIS OF

STORY'S COMMENTARIES,

WITH NOTES AND REFERENCES,

TO ENGLISH AND AMERICAN CASES,

ADAPTED TO THE USE OF STUDENTS.

BY JAMES P. HOLCOMBE.

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PREFACE.

THE Commentaries of the late Judge Story, on Equity Jurisprudence, enjoy a world-wide reputation, which the author of this volume, could neither increase with his praise, nor diminish by his censure. The critical and elaborate learning, with which every title of Equity is discussed, blending the utility of a digest, with the merit of a philosophical treatise, must always render that great work, indispensable to the lawyer, or the advanced student. But, from these very excellencies, arise some imperfections, when it is used as an elementary book. The young man, who has no previous knowledge of the principles of the science, confused amid a labyrinth of particulars, is unable to prosecute his studies, with enlightened and discriminating attention. A clear, concise, and methodical outline, of the general principles of Equity, containing only that which it is important to remember, would not only supply a want which is felt by every student, in the early stages of his reading, but would greatly facilitate his future progress, by furnishing him with the means of arranging, digesting, and reviewing his knowledge. The present volume has been prepared, in the hope that it may to some extent, accomplish these ends. It is not intended to supply the place of the Commentaries, with

any class of readers; but to serve simply as an introduction, a companion, and a supplement to their study. The text is substantially, an abridgement of that work. The same general plan, and arrangement, has been pursued, and the elementary principles which are supposed to possess most practical value, selected, and presented, with appropriate illustrations, in a greatly condensed form. The author has felt at liberty to make very considerable alterations, and additions, (entirely however of an elementary character,) believing that this course would not diminish, but increase the adaptation of his own work, to be a companion to the study of the Commentaries.

The other leading feature of the present volume, and which renders it, in some sense, supplementary to the Commentaries, is the effort to incorporate in the notes, the most striking illustrations of the principles of Equity, to be drawn from the American Reports. The value of these notes, is enhanced, by the circumstance, that Judge Story very seldom appeals to American authority, even on many points where the English and American rules are different. They have been prepared with no reference to the work of Judge Story, and embrace very little matter, in common with it. Although the author is sensible, that this portion of his task, has been executed in an imperfect manner, yet it has cost him great labor, and embraces, as he believes, a larger number of American decisions on Equity, than can be found any where else in the same compass. It is proper that he should acknowledge, in this place, the use which has been occasionally made, throughout the volume, without any particular reference, of the Commentaries of Chancellor Kent, and the notes to the American Edition of Vesey's, and Brown's Reports.

JAMES P. HOLCOMBE.

Cincinnati, May, 1846.

CONTENTS.

Page.

CHAPTER I.
On the nature of Equity Jurisprudence,..... 9

CHAPTER II.
The origin and history of Equity Jurisprudence,..... 14

CHAPTER III.
General view of Equity Jurisprudence,..... 19

CHAPTER IV.
Concurrent Jurisdiction—Accident,..... 27

CHAPTER V.
Mistake,..... 33

CHAPTER VI.
Actual or Positive Fraud,..... 42

CHAPTER VII.
Constructive Fraud,..... 50

CHAPTER VIII.
Account,..... 71

CHAPTER IX.
Administration,..... 87

CHAPTER X.
Legacies,..... 97

CHAPTER XI.
Confusion of Boundaries,.....103

Page.

CHAPTER XII.

Dower,.....105

CHAPTER XIII.

Marshalling of Securities,.....108

CHAPTER XIV.

Partition,.....110

CHAPTER XV.

Partnership,.....114

CHAPTER XVI.

Rent,.....119

CHAPTER XVII.

Rescision, Cancellation, and Delivery of Instruments,.....120

CHAPTER XVIII.

Specific Performance of Agreements, and other Duties,.....123

CHAPTER XIX.

Compensation, and Damages,.....135

CHAPTER XX.

Interpleader,.....137

CHAPTER XXI.

Bills Quia Timet,.....141

CHAPTER XXII.

Bills of Peace,.....146

CHAPTER XXIII.

Injunctions,.....148

CHAPTER XXIV.

Exclusive Jurisdiction—Trusts,.....169

CHAPTER XXV.

Marriage Settlements,.....176

CHAPTER XXVI.

Terms for Years,.....182

CHAPTER XXVII.

Mortgages,.....184

CHAPTER XXVIII.

Assignments,.....195

Page.

CHAPTER XXIX.
Wills and Testaments,....201

CHAPTER XXX.
Election and Satisfaction,....208

CHAPTER XXXI.
Application of Purchase Money,....216

CHAPTER XXXII.
Charities,....218

CHAPTER XXXIII.
Implied Trusts,....230

CHAPTER XXXIV.
Penalties and Forfeitures,....254

CHAPTER XXXV.
Infants,....258

CHAPTER XXXVI.
Idiots and Lunatics,....263

CHAPTER XXXVII.
Married Women,....266

CHAPTER XXXVIII.
Set-off,....284

CHAPTER XXXIX.
Establishing Wills,....288

CHAPTER XL.
Awards,....290

CHAPTER XLI.
Writs of Ne Exeat Regno, and Proceedings on Issues,....293

CHAPTER XLII.
Bills of Discovery; and to Preserve and Perpetuate Evidence....298

CHAPTER XLIII.
Peculiar Defences and Proofs, in Equity,....301

INDEX....313

CHAPTER I.

ON THE NATURE OF EQUITY JURISPRUDENCE.

1. DEFINITION OF EQUITY JURISPRUDENCE.
2. HOW COURTS OF EQUITY ARE DISTINGUISHED FROM THOSE OF COMMON LAW.
3. GENERAL RULE OF EQUITY JURISDICTION.
4. HOW AFFECTED BY EXTENSION OF THE JURISDICTION OF COURTS OF LAW.
5. SUBJECTS OF EQUITY JURISDICTION CLASSIFIED.
6. CRIMINAL COGNIZANCE OF EQUITY.

1. How may Equity Jurisprudence be defined ?[1]

The very terms of a Court of Equity and a Court of Law, as contrasted with each other, are apt to confound and mislead us; as if one judged without equity, and the other was not bound by law. The older books abound with vague, imperfect, and inaccurate descriptions of Equity, derived partly from the wide latitude of authority which the early Chancellors arrogated to themselves, and partly from the use of the word in a more enlarged sense by Continental jurists. In England and in this country, Equity Jurisprudence has acquired a restrained and

[1] Some such tribunal as a Court of Equity, exists under some modifications in almost every civilized country. Legislators have found that no positive enactments, however maturely considered, and well adapted for their object, could provide for the new exigences, daily arising amongst an increasingly populous and enterprising people. Hence systems have

qualified meaning, and may be defined as that portion of remedial justice, which is exclusively administered in Courts of Equity, in contradistinction to that portion of remedial justice which is exclusively administered by Courts of Common Law. The rights which are recognised and protected, and the wrongs which are redressed in the former tribunals, are called equitable rights and equitable injuries, in the latter tribunals, legal rights and legal injuries.

2. What are the principal distinctions between Courts of Equity and Courts of Common Law?

They arise chiefly from a difference between the rights which they recognise, the forms of remedy they apply, and the modes of proceeding they adopt. Thus, for example, where an estate is vested in a person upon a particular trust or confidence, such Trust, as it is technically termed, will not be recognised or protected by Courts of Common Law. But these trusts are cognizable in Courts of Equity, and are hence called equitable estates; and an ample remedy will be furnished there, to the parties beneficially interested, for all wrongs and injuries, whether arising from negligence or positive misconduct. There are numerous cases, where Courts of Equity will control and

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every where sprung up, founded upon the principles of natural and universal justice, to supply the deficiences, and assist and guide the administration of positive law. The history of the establishment of Courts of Equity in England, as seen in the next chapter, affords a striking example of that *Vis medicatrix*, to which every nation is indebted for the wisest part of its jurisprudence. In Rome, it was eminently conspicuous in the office of Prætor, who was called upon to decide upon the written and positive law, and give judgment according to conscience, where a rigid adherence to the letter of the law would work injustice. The chief distinction between the prætor's tribunal, and that which is called the extraordinary Court of Equity is, that at Rome there was no separation of the legal from the equitable jurisdiction. The Court of Sessions in Scotland is a Court of Equity, as well as a Court of Law. It seems peculiar to English Jurisprudence to have two distinct tribunals for the administration of law and equity. It is believed, however, that the most difficult problem in the theory of government, the *experimentum crucis* of legislative wisdom, to provide for the equitable "correction of that wherein the law, by reason of its universality, fails," is most successfully solved by this separation of the jurisdictions.

vary the legal rights of the parties, on the strength of principles which Courts of Common Law either do not respect, or have no means of enforcing; as in the case of mortgages and securities, of the administration of assets, of penalties and forfeitures, of mistake, accident, and fraud, of oppressive proceedings, and unconscionable bargains. So, a Court of Equity will, in many instances, compel the specific performance of a contract, whereas Courts of Law can only give damages for the breach of it. A Court of Equity will also interfere, by way of injunction, to prevent an injury, whereas Courts of Common Law can only grant redress, in damages, after its commission. In Courts of Common Law, contested facts are tried by the intervention of a jury, and the evidence is generally to be drawn, not from the parties, but from third persons, who are disinterested witnesses. Courts of Equity try causes without a jury, except under special circumstances; and they not only use the testimony of disinterested witnesses, but they address themselves to the conscience of the defendant, and require him to disclose, on oath, every material fact within his knowledge.[1] Courts of Common Law cannot acquire jurisdiction over a case, unless it is brought within the reach of certain prescribed forms of action; nor can they adapt their relief to its peculiar circumstances, but must give a general judgment for the plaintiff or defendant. In Equity, however, the forms of proceeding are more flexible, and can be readily adapted to the posture of every different case. Its inquiries are not limited, as in Courts of Common Law, to the immediate parties in litigation, but all persons interested in the results of the suit, may be brought before it.

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[1] "A defendant in a Court of Equity has a protection arising from his own conscience, which the law does not give him. If he positively, plainly, and precisely denies the assertion in the bill, and one witness only proves it, as positively, clearly, and precisely as it is denied, and there is no circumstance attaching credit to the assertion overbalancing the credit due to the denial, there a Court of Equity will not act upon the testimony of that witness. Not so at law. There the defendant is not heard. One witness proves the case, and however strongly the defendant may incline to deny it upon oath, there must be a recovery against him." 6 Ves., Jun. 184.

It is not confined to a simple judgment for either party, without qualifications or conditions, but may adapt its decree to the exigences of the particular case, and so vary, restrain, and model the remedy as to do entire justice between all parties.

3. By what general rule is the jurisdiction of Equity described?

Courts of Equity have jurisdiction in cases of rights recognised and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.[1] If the remedy at law is doubtful or obscure, or if it falls short of what the party is entitled to, or if it does not reach the whole mischief, and secure the whole right of the party, in a perfect manner, both at the present, and in future time, a Court of Equity will interfere, and grant such relief as the circumstances of the case may require.

4. Will a jurisdiction which has once attached in Equity for want of a remedy at law, be lost or destroyed by such a subsequent extension of the jurisdiction of a Court of Law, as will supply the original defect?

It will not. The jurisdiction once legitimately vested in the Court will remain there, until the Legislature abolish or limit it. This doctrine is cherished by Courts of Equity, and constitutes the pole-star of portions of its jurisdiction.

5. What division may be made of the subjects of Equity Jurisdiction?

The best basis for such a division is adopted by Fonblanque,

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[1] The line of jurisdiction embraced by this maxim, cannot be drawn with entire precision. In 1 Vesey, Jun. 416, it is laid down, that "Equity will take jurisdiction where there may be a remedy at law, but it is doubtful or difficult." It is held in 22 Pick, 271, that, "if a party cannot avail himself of his remedy at law, for any beneficial purpose, or if it be doubtful whether he can or not, a Court of Equity will relieve him; and that a remedy by an action for damages against a person actually insolvent, is not a plain, adequate and complete remedy, so as to deprive the Court of jurisdiction." That insolvency should of itself constitute a test of jurisdiction, is favored by the inclination of the modern decisions, on bills filed for the specific performance of contracts in relation to personal property. Vide chap. 18. The specific cases comprehended under the general rule are enumerated in chapter 3d.

and is pursued in this volume. It is founded upon a comparison of the powers of Equity, with those of Common Law. Considered with this reference, the jurisdiction of Equity is either concurrent with the jurisdiction of a Court of Law, auxiliary to it, or exclusive of it.[1] Mr. Maddock has adopted a less accurate and comprehensive classification, founded upon the various subjects cognizable in Equity, enumerating under each distinct head the principles applicable to it. Thus he has divided the jurisdiction into six parts: First, Accident and Mistake; Second, Account; Third, Fraud; Fourth, Infants; Fifth, Specific Performance of Agreements; Sixth, Trusts.

6. Have Courts of Equity any criminal cognizance?

Courts of Equity have no jurisdiction over criminal proceedings, except that under certain special circumstances, they will restrain a public nuisance. Where a party is vexatiously proceeding criminally, as well as in Equity, he may be compelled to elect one remedy, and abandon the other, under the ordinary power of the Court, to impose terms upon parties, who seek its aid in furtherance of their rights.

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[1] In cases of concurrent jurisdiction, the party will not be allowed to proceed at the same time, both in law and Equity, nor can he, in the event of a failure in one Court, resort to another. The matter in controversy is to be settled conclusively by the Court which first takes jurisdiction. 3 Yer. 167., 2 Mun. 34., 9 Wheaton, 532.

CHAPTER II.

THE ORIGIN AND HISTORY OF EQUITY JURISPRUDENCE.

1. ORIGIN OF THE EQUITABLE JURISDICTION OF CHANCERY.
2. EVIDENCE AFFORDED BY THE RECENTLY DISCOVERED RECORDS.
3. CAUSES OF THE INCREASE OF JURISDICTION.
4. EXPANSIVE NATURE OF EQUITY JURISDICTION.
5. PRESENT AND FORMER CHARACTER OF EQUITY JURISPRUDENCE CONTRASTED.
6. EQUITY AS ADMINISTERED IN THE STATE AND FEDERAL COURTS OF THE UNION.

1. What is the most probable theory as to the origin of the extraordinary or equitable jurisdiction of Courts of Chancery?[1]

That of Lord Hardwicke. The Chancery is the grand officina justitiæ, out of which all original writs issue under the great seal, returnable into the Courts of Common Law, to found proceedings in actions competent to the Common Law Jurisdiction. The Chancellor, says Lord Hardwicke, being the proper

[1] Besides the specially delegated jurisdiction from the crown, as in cases of infants and lunatics, the Chancellor exercises an ordinary or Common Law jurisdiction. There is no Court in this country, corresponding to the ordinary Court of Chancery in England. That Court is one of the most ancient in the kingdom, and is regulated by the same principles, and proceeds according to the same forms as Courts of Common Law.

judge whether on such a petition he could frame and issue a writ adequate to the relief of the party, might, if he found the Common Law remedies deficient, proceed according to the extraordinary power committed to him, in the reference; Ne curia Regis deficeret in justitia exercenda. According to the opinion of Lord Hardwicke, its jurisdiction is, in reality, the residuum of that of the commune concilium, or Aula Regis, not conferred on other Courts, and necessarily exercisable by the crown, as a part of its duty and prerogative to administer justice and equity. If this account is historically correct, the jurisdiction may be deemed, in some sort, a resulting jurisdiction, in cases not submitted to the decision of the other Courts, by the crown or Parliament, as the great fountain of justice.

2. How has this theory been confirmed by the recent investigations of the Commissioners on the public records?

Many petitions in Chancery, more ancient than any supposed to have been in existence, have been found among the records in the Tower. Several of these petitions have been discovered, of a period as far back as the reign of Edward I. Most of these applications to the Chancellor seem to have been presented in consequence of trespasses, assaults, and a variety of injuries cognizable at Common Law, but for which the party was unable to obtain redress, in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or some officer of the county in which they occurred. Thus the present rule of Equity Jurisdiction seems to have been the original ground on which it was entertained, viz: that a wrong was done, for which there was no plain, adequate, and complete remedy at law.[1]

It was in theory, until recently, the *officina Brevium* (a fiction had long since made the practice obsolete,) whence issued all the original writs, necessary in the course of the administration of justice. It holds pleas of recognizances acknowledged in the Chancery, writs of *scire facias*, for the repeal of letters patent, writs of partition, and all personal actions by or against any officer of the Court.

[1] "It is a great misconception of a Court of Equity," says Mr. Binney, in his beautiful eulogy on Chief Justice Tilghman, "to suppose that it overturns the Common Law. Equity is a part of the Common

3. What causes have chiefly contributed to extend the Jurisdiction?

It was greatly expanded by the reference to the Chancellor by Parliament, of petitions presented to them, and farther by the introduction of uses of land, about the end of the reign of Edward III, and the invention of the writ of subpœna, during the reign of Richard II. It continued to grow in importance, until, under the fostering and ambitious administration of Cardinal Wolsey, it assumed an almost boundless jurisdiction. A vehement opposition, principally conducted by Lord Coke, was raised to it during the reign of James I; especially to its power of issuing injunctions to judgments, and other proceedings to prevent irreparable injury. Over this it finally triumphed, and under the enlightened labors of Hardwicke and Eldon, has assumed a form so well adapted to the increasing wants of society, that it now almost overshadows, in importance, the Courts of Common Law.

4. What is to be inferred from this sketch of the origin of Equity Jurisdiction?

As its very foundation is the want of a plain, adequate, and complete remedy at law, it is obvious that it possesses an almost indefinite power of expansion,[1] and the sole question applicable

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Law: and a Court of Chancery is the homage paid by a free constitution to the integrity of the Courts of Common Law. It is the handmaid of those Courts. It restrains dishonest men from applying the rules of those tribunals to cases which they ought not to embrace; it extends to the upright the benefit of a rule of those Courts, of which a defect in circumstances deprived them; and it attains its purposes by a process between parties, and through methods of relief, almost necessarily different from those of the Courts of Common Law, but in perfect analogy with what the rules of those Courts effect, when they properly apply. It is no more the reproach of the Common Law that it has a department of equity, than that it has a department of admiralty law, and ecclesiastical law."

[1] An illustration of the influence of the progress of art, and commerce, even within a recent period, upon this jurisdiction, may be seen in the case of the piracy of marks or signs used by merchants in trade. When this question was first raised, more than a century ago, Lord Hardwicke said, "it was entitled to no more weight than if one innkeeper

to the point of jurisdiction, in every new case, must be, whether such rights and wrongs do exist, and whether there are full and adequate remedies to redress them in other Courts.

5. Do Courts of Equity at the present day exercise as wide a latitude of discretion, in the decision of cases, as the early Chancellors?

Anciently, the Court of Chancery administered justice according to what appeared to be the dictate of conscience, as applied to the case, without any regard to law or rule. As, however, the influx of business into Chancery, gave permanent importance to the judicial functions of the Chancellor, and precedents accumulated upon the Court, equity, by gradual and almost imperceptible degrees, became a system of jurisprudence as strictly technical, as the law. Indeed, it is said by a distinguished writer, that there are now many settled principles of equity which require to be moderated by good conscience, as much as the most rigorous rules of law did, before the Chancellor interfered on equitable grounds. It is certain that Courts of Chancery do not now assume a discretionary power over principles and established precedents, but administer justice by rules as fixed and certain as those of Courts of Common Law.

6. How is Equity Jurisprudence administered in the State and Federal Courts of this country?

The constitution of the United States has, in one clause, conferred upon the national judiciary, cognizance of cases in equity, as well as in law. Cases of equity, in that clause, have been uniformly interpreted to mean cases, which, in the jurisprudence of England, are so called, as contradistinguished from cases at the Common Law. So in those Courts, Equity Jurisprudence, both as to matters of jurisdiction and modes of remedy, is founded upon, co-extensive with, and conformable to,

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should set up the same sign with another." The interests of trade and commerce have since peremptorily demanded the judicial recognition of the right to the exclusive enjoyment of these marks or signs, and it is now settled that equity will restrain their piracy by injunction. Am. Jurist, vol. 5, 140.

that of England.[1] It is recognised and administered in nearly all the States, with a greater or less degree of conformity to the English system. In some of the States of the Union, distinct Courts of Equity are established; in others, the powers are exercised concurrently with the Common Law Jurisdiction by the same tribunal, being at once a Court of Law and a Court of Equity, somewhat analagous to the case of the Court of Exchequer in England. In others, no general Equity powers exist, but the ordinary Courts of Law possess a limited statutable jurisdiction.[2]

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[1] In Gordon & al. *vs.* Hobart & al., 2d Sumner, 405, Judge Story says: "The Equity jurisdiction of the Courts of the United States is independent of the local laws of any State, and is the same in its nature and extent in all the States; and the same in its nature and extent as the Equity Jurisprudence of England, whence it is derived. Therefore it is no objection to this jurisdiction, that there is a remedy under the local law." Similar views of this subject are taken by the Supreme Court of the United States, in 6th Peters, 659, and 15th Peleis, 15. A different doctrine, however, is maintained by Justice Baldwin. 1 Bald. Reports, on the ground that the jurisdiction would deprive the defendant of his constitutional right of trial by jury.

[2] In England, the Chancellor is assisted in the exercise of his equitable jurisdiction by the Master of Rolls, and three Vice Chancellors, the former of which is a very ancient office, and the latter was established by act of Parliament, in the fifty-third year of George III, creating one Vice Chancellor, and subsequently, in 1841. creating two more, who, though they each sit in separate Courts, and exercise their jurisdiction severally, yet together with the Lord Chancellor, constitute one Court of Chancery, in which all orders and decrees, though most commonly made by the Master of the Rolls, or the Vice Chancellor, require the signature of the Chancellor, to whom an appeal also lies from the decisions of either of the inferior judges. But such appeals are, in strictness of speech, re-hearings, the Chancellor being by legal fiction, supposed to be present in every department of the Court of Chancery. The re-hearing of such appeals, and incidental applications, or motions, in original causes, constitute the ordinary business of the Lord Chancellor, it not being the usual practice to bring causes, in the first instance, before him. In the year 1841, the Equity jurisdiction of the Exchequer was transferred to the Court of Chancery.

CHAPTER III.

GENERAL VIEW OF EQUITY JURISPRUDENCE.

1. LORD COKE'S SUMMARY OF EQUITY JURISPRUDENCE.
2. MODE OF ASCERTAINING ITS NATURE AND EXTENT.
3. GENERAL MAXIMS OF A COURT OF EQUITY.
4. EQUITY FOLLOWS THE LAW.
5. WHERE THERE IS EQUAL EQUITY THE LAW MUST PREVAIL.
6. HE WHO SEEKS EQUITY MUST DO EQUITY.
7. EQUITY DELIGHTETH IN EQUALITY.
8. EQUITY LOOKS UPON THAT AS DONE WHICH OUGHT TO BE DONE.
9. WHEN RELIEF IS CONSEQUENT ON DISCOVERY.
10. DISPOSITION OF AMERICAN AUTHORITIES.
11. WHAT IS ESSENTIAL TO OBTAIN RELIEF IN A BILL OF DISCOVERY.

1. What is Lord Coke's enumeration of the subjects of Equity Jurisdiction, and why is it defective?

Three things, according to Lord Coke, are to be judged of in a Court of Equity—matters of fraud, accident, and trust. This description is imperfect, because it is not co-extensive with the boundaries of Equity Jurisdiction, and inaccurate, because cases of fraud, accident, and trust, are neither exclusively, nor universally, remediable in Equity. For example, a party may obtain relief at law, where a deed or a devise of lands has been procured by fraud, or where a mistake has occurred in an account or receipt, or the strict performance of a condition has become impossible, from accident. The jurisdiction of Courts of Law even embraces some classes of trusts, as those arising

on bailments, or where the action for money had and received to another's use may be maintained. On the other hand, there are many cases of fraud, accident, and trust, in which the suffering party can obtain no assistance from a Court of Equity. Thus a Court of Equity will not restrain a man from waging his law in an action of debt, however unconscientious it may be; nor compel him to disclose a fraud which he has perpetrated, if it involve a public crime; nor afford him any relief, if by accident another person has been prevented from making a will in his favor; nor will they enforce trusts growing out of illegal contracts, nor executory trusts, which are purely voluntary.

2. What is the best mode of ascertaining the nature and extent of Equity Jurisdiction?

It can only be done by an examination of its actual limits, in each class of cases. The grounds upon which it exercises jurisdiction, so often run into each other, that it is impracticable to arrange the cases in a scientific method. They will be considered in this volume separately, under that branch of Equity Jurisdiction into which they most naturally fall—the Concurrent, the Exclusive, or the Auxiliary.[1]

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[1] The following note, taken from Mr. Laussat's edition of Fonblanque's Equity, presents a most accurate and philosophical view of the Jurisdiction, although it is not strictly pursued in this volume:

"1. The jurisdiction of Equity is assistant to the ordinary Courts where, in an action before them, the just administration of the law is impeded by a deficiency of appropriate powers. The interference of Chancery in such cases is; First, to enlighten the judgments of the Courts of Law, by laying the necessary testimony before them, which could not be reached by their forms of practice: to this end, bills are entertained for a discovery, by one of the parties litigant, for the examination of old, infirm, and going witnesses, and for the perpetuation of testimony; Second, to suppress evidence of facts and circumstances, not connected with the merits, and tending to prevent a fair trial; Third, to secure the property in dispute, until the right is determined; And Fourth, to counteract fraudulent judgments.

"2. The cognizance exercised by Courts of Equity over certain subjects, concurrently with those of law, owes its origin either to a present or former insufficiency of legal forms, to render adequate relief to a party. Much of this jurisdiction was once exclusively vested in Courts of Equity, and has been assumed by Courts of Law in late years, in

3. What general maxims have been adopted by Courts of Equity, in the exercise of their Jurisdiction?

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consequence of their increased liberality. The distinction between the concurrent and the assistant jurisdiction is, that in the exercise of the latter, Equity is a mere auxiliary in a case begun and to be concluded in a Court of Law; while in the former, it acts as an independent tribunal, and having obtained cognizance of the controversy, settles it conclusively between the parties. The concurrent jurisdiction of Chancery embraces two classes of subjects. The first is composed of such as have been drawn within the cognizance of Equity, by some special mode of administering justice, expressly applicable to the particular case. Of this nature are, First, the specific performance of agreements; Second, the specific delivery of chattels possessing an artificial value; Third, the ascertaining of boundaries that have fallen into confusion; Fourth, partitions; Fifth, the assignment of dower; Sixth, bills of peace and interpleader.

"The second class of subjects embraced by the concurrent jurisdiction of Chancery, comprises the many cases in which the general modes of proceeding and powers of Equity are preferable to the forms of the Common Law. To these advantages may be ascribed the extensive and important jurisdiction exercised by Chancery, over cases of fraud, accident, mistake, and account. The superiority of Equity in such cases, consists in the discovery, by the oath of the defendant, the special investigation of complicated facts and circumstances, by reference to masters, and the nature of a decree which embraces all conflicting interests, and does entire justice between the parties.

"3. The third general division of the Jurisdiction of Equity arises from the establishment of principles, and the possession of powers, exclusively adapted to the subject matter, but wholly inadmissible at law. Thus, trusts, equitable mortgages, and equities of redemption, the equity of a feme covert to a settlement, and to her separate estate, are confined to Chancery; because these interests are the creatures of that Court, owing their existence solely to its principles, and supported exclusively by its powers. To this general head of exclusive jurisdiction, may be referred the prevention of nuisances, waste, trespasses, infringement of patents, the rescision of inequitable agreements, and the various subjects that are the foundation of bills *quia timet*. A portion of this subject has been classed with the concurrent, and not the exclusive jurisdiction of Equity. The preventive powers, however, exercised in Chancery, operate before the subject is ripe for the Common Law. If the act has been already done, redress must be sought in the legal tribunals; and Equity can only interfere to prevent a new injury. There is, therefore, no concurrence of jurisdiction; for as Chancery anticipates

These five are of most frequent occurrence:[1] First, Equity follows the law; Second, Where there is equal Equity, the law must prevail; Third, He who seeks Equity, must do Equity; Fourth, Equity delighteth in equality; Fifth, Equity looks upon that as done, which ought to be done.

4. What is the meaning and extent of the maxim, Æquitas sequitur legem?

The maxim is not of universal application. Because there is no remedy at law, it does not follow that there is none in Equity, but often the contrary. Equity, in general, adopts the rules of law in all cases to which those rules expressly refer, and follows the analogies which they furnish, in cases of an equitable nature. But there are exceptions, as well established as the maxim. Thus, the same incidents, properties, and consequences, are attached to executed trust estates, by Courts of Equity, as are given to legal estates by a Court of Law. But a more liberal discretion is exercised in the case of executory

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the Common Law, and ends its cognizance where the latter commences, their provinces are perfectly distinct and exclusive."

[1] Francis, in his collection of maxims, has enumerated the following, in addition to those stated in the text. First, He that hath committed iniquity, shall not have Equity. Second, According to Equity, that should make satisfaction, which has received the benefit. Third, According to Equity, that should receive satisfaction, which has sustained the loss. Fourth, Equity suffers not a right to be without a remedy. Fifth, Equity relieves against accidents. Sixth, Equity prevents mischief. Seventh, Equity prevents multiplicity of suits. Eighth, Equity regards length of time. Ninth, Equity will not suffer a double satisfaction to be taken. Tenth, Equity suffers not advantage to be taken of a penalty or forfeiture, where compensation can be made. Eleventh, Equity regards not the circumstance, but the substance of the act. The student will understand how these maxims have acquired their present place in Equity Jurisprudence, when he considers the character of the jurisdiction exercised by the early Chancellors. It was one of arbitrary discretion, not of fixed rule. The maxims, which are mere declarations of principles of obvious and universal justice, were gradually adopted to direct and control the exercise of their jurisdiction. For example, the maxim, that he who seeks Equity must do Equity, was nothing more than a declaration to the complaining party, by the Chancellor, of the terms or conditions upon which he would consent to assist him.

trusts; so the statute of limitations, although not in terms applicable to Courts of Equity, are adopted by them in reference to equitable titles, both of a real and personal character, and relief is refused, if in a similar case the party would be barred by the statute, at law. But the statute does not run, as between trustee and certui que trust.[1]

5. What is the meaning of the maxim, that where there is equal Equity, the law must prevail?

When the defendant has as strong a claim on the protection of a Court of Equity as the plaintiff has on its assistance, the Court will not interpose on either side; the rule being, In æquali jure melior est conditio prossidentis. Thus, it will not entertain a bill, either for relief or discovery, against a bona fide purchaser of the legal estate for a valuable consideration, without notice of the adverse title, if he chooses to avail himself of the defence, at the proper time and in the proper mode. And this protection extends to the case, where a party originally purchased an equitable title without notice, and afterwards with notice, buys in a prior legal title to support his equitable one. Some unsettled points on this doctrine will be considered in another place. It may be added, however, that the Equity is equal, between persons who have been equally innocent, and equally diligent. It is not, however, equal in all cases, where the title of each party is purely equitable; for precedency of time will, under many circumstances, give priority in right, the

1 Courts of Equity do not follow the law, implicitly or universally, but only so far as it can be done without abandoning the principles on which their own jurisdiction was founded, and has been built up. Thus, although the positive rules of law, whether the Common or the Statute law, are binding upon Courts of Equity, yet the largest portion of Equity Jurisprudence is composed of cases, which it has withdrawn from the operation of these rules. Thus, in the principles which it adopts, in administering equitable assets, in the interpretation of contracts, as in the case of a mortgage, in the construction which it gives to statutes, as, for instance, to the statute of frauds, in the practice of enjoining judgments at law, Equity disregards and subverts the law. "This is not owing," according to Lord Talbot, "to a difference between Courts of Law and Equity, in the exposition of statutes, but in the remedies which they give, and the manner they apply them."

maxim being, Qui prior est in tempore, potior est in jure. Thus, when the legal estate is outstanding, equitable incumbrances must be paid according to priority of time.

6. How may the maxim, that he who seeks Equity must do Equity, be illustrated?

It principally applies to a party who is seeking relief, in the character of a plaintiff, in the Court. Thus, a Court of Equity will not relieve a borrower of money upon usurious interest, against the illegal excess, except on terms of his paying to the lender what is bona fide due to him. It would, however, dismiss a bill, with costs, brought by a lender to enforce his claim on the usurious instrument, because it will never assist a wrong doer to effect his illegal purposes. So it will not aid a husband to recover his wife's property, unless a suitable provision is made for her. So, where a party seeks the benefit of a purchase made for him in the name of a trustee, who has paid the purchase money, but to whom he is indebted for other advances, he shall not be relieved but upon payment of all the moneys due to the trustee.

7. When is the maxim, that Equity delighteth in equality, applied?[1]

In cases of contribution among co-contracters, sureties, and others; of abatement of legacies, where there is a deficiency of assets; of apportionment of moneys on incumbrances among different claimants; and especially in cases of the marshalling and distribution of equitable assets. Although legal assets are to be paid in the course of administration, according to the dignity and priority of debts, yet equitable assets are to be paid in proportion simply to the amount of the claim, all debts standing in pari jure, in the eye of a Court of Equity.

8. What is the meaning and extent of the maxim, that Equity looks upon that as done, which ought to be done?

Equity will treat the subject matter as to collateral consequences and incidents, in the same manner as if the final acts,

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[1] This maxim is strikingly illustrated in the aversion, with which Courts of Equity view the doctrine of survivorship. They will lay hold of very slight circumstances to repel the presumption of joint tenancy.

contemplated by the parties, had been executed exactly as they ought to have been, and not as the parties might have executed them. But the rule only applies in favor of persons who have a right to pray that the acts might be done. Thus, all agreements will be treated as actually executed, from the period when they ought to have been performed, in favor of persons entitled to insist on their performance. Money covenanted or devised to be laid out in land, will be treated in Equity as real estate, and descend to the heir, and land contracted or devised to be sold, will be treated as money.

9. What is the general rule, when the title is at law, and the party comes into Equity for discovery, and for relief, as consequent on that discovery?

In the present state of the authorities, little more can be safely affirmed than these propositions: First, that in bills of discovery, seeking relief, if any part of the relief sought be of an equitable nature, the Court will retain the bill for complete relief; Second, that in matters of account, fraud, mistake, and accident, the jurisdiction for relief will generally, but not universally, be retained and favored; and, Thirdly, that in cases where the remedy at law is more appropriate than the remedy, in Equity, or the verdict of a jury is indispensable to the relief sought, the jurisdiction will either be declined, or if retained, will be so, subject to a trial at law. In all of these cases, the jurisdiction is supported upon the common ground of preventing a multiplicity of suits; but in matters involving fraud, accident, mistake, and account, the power of a Court of Equity, to afford a more complete relief, than can be obtained at Law, makes it peculiarly proper.

10. Do the American authorities follow the English cases on this subject?

They do not. In England a distressing degree of uncertainty rests upon this branch of Equity Jurisdiction. In America, a strong disposition has been manifested to adopt a convenient and uniform principle of jurisdiction, and to entertain the bill for relief, if the plaintiff prays it, wherever the jurisdiction has once attached for discovery, and the discovery has been actually obtained.

11. What is essential to maintain the jurisdiction for relief, as consequent on discovery?

The bill must allege that the facts are material to the plaintiff's case, and that they cannot be proven, without a discovery of them by the defendant. If the answer wholly denies the matters of fact, of which a discovery is sought, the whole ground of jurisdiction is taken away, and the bill must be dismissed.[1]

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[1] To this general view of the jurisdiction, the following rules may be appropriately added:

1. Consent of parties can never give the Court original jurisdiction, and where the want of jurisdiction goes to the subject matter in dispute, it is never too late to make the objection. 2 Wash. 213; 2 Hay., 136; 3 Litt., 332; 2 Dev. & Batt, 297; 1 McChord, 242.

2. When the Court has once acquired jurisdiction of a cause, it will be retained, although the original ground of jurisdiction, as, for example, the inability of the plaintiff to recover at law, is subsequently removed. 4 Cow., 717; 2 Bibb., 435.

3. Subject to such qualifications of the doctrine as may exist in the case of bills of discovery, it is a general rule, that where a Court of Equity has obtained jurisdiction over a cause, for one purpose, it will be retained generally. 4 Cow., 717; 2 Bibb., 435.

4. *Æquitas agit in personam*, and where the person of the defendant is within the jurisdiction of the Court, it will, in a proper case, exercise jurisdiction over his property, in any part of the world; and, on the other hand, where the property is within the limits of the State, and the claimants reside abroad, the Court may have jurisdiction. 3 Gill. and Johns, 504; 2 Paige, 606.

CHAPTER IV.

CONCURRENT JURISDICTION. ACCIDENT.

1. WHAT SUBJECTS EMBRACED BY THE CONCURRENT JURISDICTION OF EQUITY.
2. WHAT IS ACCIDENT, AND WHEN IT ENTITLES A PARTY TO RELIEF.
3. FIRST CLASS OF ACCIDENTS, INCLUDING:
   - I. OF LOST INSTRUMENTS.
   - II. PRESUMPTION OF TITLE AFTER LAPSE OF TIME.
   - III. IMPERFECT ASSIGNMENTS.
   - IV. THE NON, OR DEFECTIVE EXECUTION OF A TRUST.
4. SECOND CLASS OF ACCIDENTS, INCLUDING:
   - I. PENALTIES AND FORFEITURES.
   - II. UNAVOIDABLE LOSS OF ASSETS BY EXECUTOR.
   - III. REVOLUTION OR ACT OF GOVERNMENT.
   - IV. DEFECTIVE EXECUTION OF NAKED POWER.
5. HOW POSITIVE CONTRACTS ARE AFFECTED BY ACCIDENTS.

1. What subjects are embraced under the Concurrent Jurisdiction of Equity?

This branch of Equity Jurisdiction is that, which is of the greatest extent, and most familiar occurrence in practice. It embraces two classes of cases: First, those in which a simple judgment for plaintiff or defendant, such as a Court of Law can render, would not answer the full ends of justice, and in which the interposition of Equity is necessary to adjust, by a comprehensive decree, conflicting equities and complicated interests; and, second, those in which the specific relief that is wanted, can only be obtained by the peculiar processes and

powers of a Court of Equity. Under the former class are included Accident, Mistake, Fraud, Account, Administration, Legacies, Confusion of Boundaries, Dower, Marshalling of Securities, Partition, Partnership, Rent. In the latter, Discovery where relief is sought as an incident, Cancellation and Delivery of Instruments, Specific Performance, Compensation and Damages, Interpleader, Bills Quia Timet, Bills of Peace, and Injunctions.

2. What is an accident, and when will it entitle a party to relief in Equity?

By accident is intended, not merely inevitable casualty, or the act of Providence, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party.[1] Courts of Equity will relieve in cases of accident, where a party would thereby be deprived of a clear right, or subjected to an unjustifiable loss; provided, no adequate remedy is afforded by the Courts of Law, and the person seeking relief possesses a superior Equity to the person from whom the relief is sought. It must be observed, that no relief will be afforded, where the accident is in any degree owing, to the negligence or fault of the suffering party; nor where his claim rested in mere expectancy, as where a testator was prevented by accident, from making his will in favor of a particular person; nor where the person from whom relief is sought, is entitled to equal protection, as in the case of a bona fide purchaser for a valuable consideration, without

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[1] Jeremy defines Accident to be "an occurrence in relation to a contract, which was not anticipated by the parties, when the same was entered into, and which gives an undue advantage to one of them, over the other, in a Court of Law." Judge Story points out the inaccuracy of this definition, in confining accident to matters of contract. His own definition seems, however, still more imperfect. Courts of Equity do not consider every unforseen event, which is not the result of negligence or misconduct, as an accident. It must be attended with undue loss, to the innocent person. Perhaps accident, as a ground of equitable jurisdiction, may be more completely defined as any occurrence, which would subject a party to an undue loss, not arising from his own negligence, or misconduct.

notice, or an heir, against whom it is attempted to establish an imperfect will.

3. What are the cases of most common occurrence, comprehended under the first class of accidents, or those which would deprive a party of some clear right?

First. Where a party has lost a bond, negotiable note, or other written instrument, evidencing his right, Courts of Equity will grant relief, on clear proof of its execution and contents.[1] Although this rule has been abandoned at law, wherever a deed has been lost, or destroyed by time or accident, that circumstance does, in no degree, impair the jurisdiction of Equity. Indeed, it may be maintained, on a distinct consideration, viz. the incompetency of a Court of Law to require from the plaintiff, a suitable bond of indemnity to the obligor, against any future claims which may be made, in case the security should be thereafter found. It is upon that ground, Courts of Equity relieve against the loss of a negotiable instrument, of which, profert was never required at law. The maker of a note, or acceptor of a bill, which was lost, even after maturity, has a right to such a bond of indemnity; because according to the custom of merchants, he is entitled to the possession of the paper, as a voucher for its payment, and from the extreme inconvenience to which he might be subjected, if compelled to prove its loss, in a suit by another person as holder. In the case of unsealed instruments, which are not negotiable, the jurisdiction has been greatly questioned, as the assignee of such instrument would be affected by all the equities of the original parties. The same reasons, however, exist to sustain the jurisdiction in this case, as the difficulty and expense of proving these equities, after a considerable lapse of time, entitle the party to a bond of indemnity.

Second. Where a party has been in the possession and exercise of a right over property, for a length of time, and is unable to produce any evidence to sustain it, there, a Court of Equity will infer his title, on the strength of the presumption arising from

[1] A Court of Equity will not charge a surety farther than he is bound at law; but if he cannot be charged there, in consequence of a loss of the instrument by the creditor, through accident or fraud of the obligors, Equity will give relief. 1 Call., 414; 6 Leigh., 478; 9 Vesey, 464.

possession, and give him relief. Thus, where a rent had been paid for a long time, a right was presumed in Equity, although no instrument could be adduced to establish it.

Third. Where a party, upon the transfer of a promissory note, or bill of exchange, is prevented by accident, from endorsing, it, there the transaction amounts to an equitable assignment, and a Court of Equity will clothe it with legal effect, by compelling the party, or, in case of his death, his representatives, to endorse the paper, and consummates the original intention.

Fourth. Of a similar nature, is that very large class of cases, in which a trust, or a power coupled with a trust, or in the nature of a trust, fails of execution by reason of casualty, or accident. The trustee in such a case is invested with no discretion, whether he will exercise the trust or not, it being conferred upon him, not as a mere power, but as a duty, which he ought to fulfil; and a Court of Equity will not permit his negligence, accident, or other circumstances, to frustrate the intentions of the donor, and disappoint the objects of his bounty.

4. What are the most usual cases, occurring under the second class of accidents, or those which would subject a party to an unjustifiable loss?[1]

First. Where the obligor of a bond secured by a penalty, fails through accident, to pay it at the appointed day, a Court of Equity will prevent the obligee from recovering the penalty, if an offer of full indemnity is tendered by the obligor.

Second. Where an executor has paid debts or legacies in full confidence, that the assets will prove sufficient for all purposes, and it turns out otherwise, from some inevitable casualty or unexpected occurrence, if the transaction has been attended with no negligence or misconduct on his part, a Court of Equity will relieve him from loss; although, according to the weight of authority, he would be liable for a devastavit at law.

Third. Where a revolution or an act of Parliament would subject a party to an undue loss, it will be treated as an accident, against which Equity will relieve. Thus, where a will directs

[1] In this connection it may be stated, that where a party is prevented by accident, from making a defence to a suit at law, Equity will relieve him. Vide., 2 Henn and Mun., 10; 7 Porter 159, and chapter 23d of this volume.

an annuity to be secured by public stock, and an investment is accordingly made, which afterwards proves insufficient, by reason of an act of Parliament reducing the stock, a Court of Equity will decree the deficiency to be made up by the residuary legatees.

Fourth. Where the perfect execution of a mere power, created by private parties, is prevented by accident, as if the prescribed witnesses are sent abroad by government, and cannot be obtained, a Court of Equity will grant relief; if the defect does not enter into the very essence or substance of the power. The rule, however does not apply to the non-execution of a power;[1] nor in favor of all persons; but only of those entitled in a moral point of view to the peculiar consideration of Equity; such as purchasers, creditors, a wife, a child, or charity; nor where there are opposing equities on the other side; nor where the power is created by statute, and the prescribed formalities are a part of its apparent policy.

5. Where a party has entered into a positive contract or obligation, which he is prevented from fulfiling, or of the benefit of which he is deprived, by accident, will Equity relieve?[2]

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[1] This distinction between the non-execution of a power, and its defective execution, has been frequently assailed as inconsistent, and resting on no sound principle. It is defended by Judge Story, on the ground, that to relieve against the non-execution of a power, would defeat the intentions of the donor, by depriving the donee of the discretion with which he was invested, but to aid its imperfect execution is to carry those intentions into effect. It is obvious, however, that this reasoning does not apply to a case, where the donee has determined to execute a power, and is prevented by accident.

[2] The doctrine on this subject was carried very far in the case of Ross *vs.* Overton, which occurred in Virginia, 3 Call., 309, 2 Henn and Mun., 408. A tenant leased a mill, covenanting to keep the same in repair. In consequence of a freshet, in James River, it was entirely demolished and carried away by ice. Mr. Madison, Judges Tazewell and Jones, who were chosen arbitrators by the parties, decided that the tenant was bound to rebuild. The Court of Appeals, on two occasions, refused to interfere with this decision, professing to be governed by the well settled principle, that an award should not be disturbed, although the arbitrators committed an error in a doubtful point, yet inclining to the opinion, that the law of the case was correctly decided. Judge Tucker,

It will not; on the ground, that a party not having provided for such a contingency, must have intended a general liability. Thus, where there is an express covenant to pay rent, it must be paid, although the premises are actually burnt down during the term.

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however, in his Commentaries, contends, that on no fair principle of construction can a covenant to repair, be construed as a covenant to rebuild, and the tenant be thus made an insurer of the property against floods and fire.

CHAPTER V.

MISTAKE.

1. MEANING OF MISTAKE, AND HOW IT MAY ARISE.
2. MISTAKES ARISING FROM IGNORANCE OF LAW, AND IGNORANCE OF FACT, HOW DISTINGUISHED.
3. WHERE ONE SECURITY HAS BEEN SELECTED IN PREFERENCE TO ANOTHER, THROUGH MISTAKE OF LAW.
4. WHERE A PARTY DISPOSES OF PROPERTY IN IGNORANCE OF HIS TITLE.
5. BY WHAT PRINCIPLE COMPROMISES ARE GOVERNED.
6. NO RELIEF GRANTED AGAINST JUDGMENT, BECAUSE POINT OF LAW DIFFERENTLY ADJUDICATED AT FUTURE TIME.
7. QUALIFICATIONS OF THE RULE, AS TO IGNORANCE OF FACT.
8. MISTAKES ARISING FROM SURPRISE, IMPOSITION, AND MISPLACED CONFIDENCE.
9. WHERE MISTAKE IS MADE UNDER MUTUAL SURPRISE.
10. WHEN COURTS OF EQUITY WILL REFORM WRITTEN AGREEMENTS.
11. HOW FAR PAROL EVIDENCE IS PERMITTED TO AFFECT WRITTEN CONTRACTS.
12. WILL EQUITY DECREE THE SPECIFIC PERFORMANCE OF A CONTRACT, WHEN REFORMED.
13. EQUITY WILL SUPPLY THE OMISSION OF ACTS AND CIRCUMSTANCES.
14. THE DEFECTIVE EXECUTION OF POWERS AIDED.
15. WHEN MISTAKES IN WILL CORRECTED.
16. GENERAL LIMITATION ON THE JURISDICTION IN CASES OF MISTAKE.

1. How may mistake be defined, and what are its sources?

As contradistinguished from accident, it is any unintentional act, or omission, or error, arising from ignorance, surprise, im-

position, or misplaced confidence. It may be a mistake in matter of fact, or matter of law.

2. Will Courts of Equity grant relief, where a mistake has been committed through ignorance ?[1]

Where the ignorance is of a material fact, and the suffering party has been guilty of no negligence, or laches, Courts of Equity, as a general rule, will grant relief. Where the party, however, is fully informed of the facts, and the mistake has resulted from ignorance of law, the general rule is different, and Equity will not interfere to rescind agreements, or set aside the solemn acts of the parties. The grounds of this distinction are two-fold: The first rests upon the presumption, that every man does, or may know the law, and that to permit his ignorance to shield him, would encourage and protect culpable negligence: *ignorantia legis neminem excusat.*[2] But

[1] There is an able and elaborate article on Mistakes of Law, in the 5th volume of the Am. Jurist, 146. The writer dissents from many of the statements in the text, as not sustained either by principle or authority. He declares, as the result of his investigations, "that in cases involving no peculiar considerations, where a man has, through mistake as to his rights and duties, done or undertaken to do an act, which he was under no obligation, legal or moral, to do, if he can be restored to his former condition without any infringement of the rights of others, it should be done." He considers the weight of American authority in favor of the doctrine, that mistakes of law are remediable. In Maryland, South Carolina, and Kentucky, it has been repeatedly and positively affirmed. The bearing of the late decisions in New York is towards it. It has been lately held by the Supreme Court of Ohio, that a mistake of law may be corrected in Equity. It would be unsafe for the student to receive the broad doctrines laid down by Judge Story, on the subject, as well settled law in this country. Vide.. 1 Edw., 467; 6 Paige, 189; 18 Wend., 467; 6 Har. and Johns, 500; 4 Dana, 309; 2 M'Chord's Ch. R., 455; 2 Bailey, 623; 11 Oh., 232, 480; 9 Pick., 112.

[2] The writer of the article referred to, in the Jurist, considers the maxim perverted, when used in this connection. "The spirit of the maxim, we believe to be, that ignorance shall not be made the occasion or the apology for violating the rights of any man. It should furnish no excuse for a wrong done, a duty neglected, or a right withheld. But what excuse does a man need for asking to have what, in all honesty, belongs to him; or for declining to do what he is under no obligation, legal or moral, to perform ?"

no degree of diligence can possibly inform a man of every material fact, and his ignorance may therefore be excused. The second depends upon considerations of policy. If ignorance of law was considered sufficient to release a man from his engagements, the nature and difficulty of the proper proofs, would introduce the utmost confusion and embarrassment into Courts of Justice. Courts of Equity aim at practical good, rather than theoretical perfection, and seek less to administer justice in all possible cases, than to furnish a rule which will secure it in the common course of human business. The distinction is illustrated in the following cases: Where an instrument, by the generality of its terms, releases the rights of a party to property, not contemplated by the bargain, and of his title to which he was wholly ignorant; Equity will restrain the operation of the instrument, and confine the release to the rights intended to be extinguished.[1] But where the obligee of a bond releases one of two joint obligors, supposing that the other would remain bound, Equity will not relieve him on the mere ground of his mistake of the law.[2]

3. Where one security has been deliberately selected by the parties in preference to another, through a mistake of law, will a Court of Equity grant relief, by reforming the selected instrument, so as to give it the same effect as that which was rejected?

It will not. This question was most elaborately considered by the Supreme Court of the United States, in the case of Hunt *vs.* Rousmaniere, 1 Peters, 13, 14, where relief was denied. It would be equivalent to decreeing a new agreement, not contemplated by the parties, instead of executing that ac-

[1] A partnership debt is not extinguished in Equity, although it is otherwise at law, by the bond of an individual partner. 9 Leigh., 424; 11 Oh., 232.

[2] The correctness of this doctrine is not universally conceded. It was held in 6 Johns, C. R., 242, that the maxim of the Common Law, that a release of one joint debtor is a release of all, was not applicable to cases of joint trusts, where the party released was not in default. In 5 Gill. and Johns, 314, and 1 Freem., 229. Equity refused to give a release of one joint debtor by the obligee, an operation beyond the intention of the parties.

tually made by them. Although Equity may compel parties to execute their agreements, it has no authority to make agreements for them, or to substitute one for another.

4. Where a party, acting under misapprehension of a plain and well settled principle of law, supposes that he has no title to property with which he parts, under the name of a compromise, or for a nominal consideration, will a Court of Equity grant relief?

It will. And this is supposed to be an exception to the general rule. It would seem, however, to involve a mistake of fact, as well as law. Besides, the circumstances in all cases have been such, as to warrant the presumption of undue influence, imposition, mental imbecility, surprise, or confidence abused, which, upon other principles, would be sufficient to vacate the contract.

5. What principles are applicable to the case of compromise?[1]

Compromises of a doubtful right, fairly entered into by parties, will be binding; and their validity cannot be affected by any future adjudication. In such a case, if both parties are in the same ignorance, the compromise is equally binding, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law. But it is very different if the parties are not mutually ignorant. A party will not be bound in Equity who has acted upon his rights, without a full knowledge of all the doubts and difficulties that may arise.

In favor of family compromises, Courts of Equity upon principles of policy, and to sustain the honor or peace of families, administer an Equity which is not applied to agreements gen-

[1] The question as to the effect of a mistake of law, is not raised on a compromise. The parties professedly regard their rights as doubtful, and act upon that basis. Let the law turn out as it may, they cannot be said to have been under a mistake. If two individuals, standing on equal terms, have fairly and deliberately entered into an agreement respecting a right, that is really doubtful, there is no more reason why their act should be set aside, because the right turns out the one way or the other, than there is that a sale of merchandize should be held void, because, presently afterwards, prices rose or fell in the market. Am. Jurist, 164, vol. 5.

erally, and will uphold them, when fairly and reasonably made, with a strong hand.

6. Where judgment has been obtained upon a point of law, which at a subsequent period is adjudicated differently, will Equity grant relief against the judgment?

It will not; otherwise the sources of litigation would never be closed.

7. How is the general rule, that Equity will relieve where a party made a contract in ignorance of a material fact, qualified?

First, The ignorance must not arise from the default of the party. Second, The fact, as to which the ignorance existed, must have operated upon the parties, as a moving consideration to their contract. Thus relief will be granted, where a bargain is made upon the mistaken supposition of an existing right. For example, a Court of Equity would rescind a contract for the sale of a life estate, if, at the time it was made, the estate had been terminated by the death of the person, for whose life it was held, upon the ground of a mistake of the fact, which constituted its basis. Third, In relation to extrinsic circumstances, each party is presumed to exercise his diligence and judgment, and as a general rule, ignorance of a material fact, known to the other, will afford no ground for relief. In the leading case of Laidlaw *vs.* Organ, 2 Wheaton, 178, 195, the rule is laid down that if a vendee is in possession of facts, which will materially enhance the price of the commodity, and of which he knows the vendor to be ignorant, he is not bound to communicate them, and the contract will be held valid. Thus, if A, knowing there was a mine in the land of B, of which B was ignorant, should purchase the land, without disclosing that fact, for a price in which the mine is not taken into consideration, B would not be entitled to relief from the contract. So, if a vendee has private knowledge of a treaty of peace, by which the price of a commodity is greatly enhanced, he is not bound to disclose that fact to the vendor, at the time of his purchase. The Court will not set aside such a transaction, unless there

[1] The doctrine of this case has been most profoundly examined by Mr. Verplanck, in his Essay on Contracts. He repudiates it as inconsistent with sound morals. It is farther considered in chapter 6th.

was some legal obligation upon one party, on the ground of confidence or otherwise, to communicate the facts to the other. The case must fall within some definition of fraud, or surprise.

8. How is the remaining class of mistakes, arising from surprise, imposition, or misplaced confidence, regarded in Equity?

A mistake from any of these causes, whether of law or fact, will give the suffering party a title to relief in Equity. They, in almost every instance, create a case of actual or constructive fraud, and a Court of Equity, proceeding upon principles to be hereafter considered, will protect a party who is unable to take care of himself.

9. Will Courts of Equity relieve against contracts made under a mutual surprise?

They will, where the error respects circumstances, which induce the contract. There can be no objection to this jurisdiction, as neither party has intended, what has been done.

10. When will Courts of Equity reform written agreements?[1]

A written agreement may contain more or less than what the parties intended, or something different from their intentions. These mistakes may happen either from carelessness on the part of the draftsman, or ignorance as to the legal and proper mode of executing the instrument.[2] In either case, when made

[1] It is a question of very considerable importance, how far Courts of Equity will go in correcting mistakes in bonds, prescribed by statute. They have assumed jurisdiction for that purpose, even as against securities, in New York and North Carolina, South Carolina and Tennessee. 1 John, 607; 2 Hay, 332; 1 Iredell's E. R., 123; 3 Desau., 57; 10 Yerg., 465. To the same effect, 10 Peters, 343; contra 1 Bibb, 214.

[2] Courts of Equity do not regard the forms of instruments, but their intent, and give to the acts of parties that construction which is consistent with the intent and with Equity. Thus, where an assignment of property, originally given to a soldier as a bounty, was made without words of inheritance, it was held, that, although the assignment in law gave only a life estate, yet as it was clearly the intention of the parties to convey the whole estate, a trust estate in fee was to be considered as created and conveyed; and the Court would, therefore, decree an adequate legal conveyance in fee, according to the intention of the parties. 5 J. C. R., 22, 26. So it was decided in 7 Oh., 165, part 2d., that although an administrator's deed contain no words of perpetuity, yet if the sale was in fact made of the whole estate, Chancery will aid the defect.

out by proofs entirely satisfactory, Equity will reform the contract, so as to make it conformable to the precise intent of the parties. This relief is not confined to the altering of executory contracts, and conforming them to the intentions of the parties, but is extended to executed contracts.

11. How far do Courts of Equity, in exercising this jurisdiction, depart from the rule at Law, which excludes the admission of parol evidence, to vary or control written contracts?

The written paper is treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy. As the rule was formed to suppress frauds, and to promote general good faith, it would seem a proper exception, and standing upon the same principle, to correct an instrument in which a material stipulation had been omitted or inserted, through fraud or accident. A party would otherwise be enabled to resist the claims of justice, under the shelter of a rule framed to promote it. The mistake may be either established by express proof, or fairly implied from the nature of the transaction. Thus, where there is a joint loan of money, and the parties give a joint bond, a Court of Equity will reform it, so as to make them jointly, as well as severally liable, upon the reasonable presumption that the debt being joint, it must have been intended, that an equal responsibility should attach in every event, to each obligor. So, if one of the obligors should die, the creditor may proceed immediately against his assets, in Equity, without claiming relief from the surviving joint contractors, or showing their insolvency.[1]

Equity will not interfere, however, where the circumstances repel the presumption of a joint original debt, or liability. Thus, it will not make a joint bond several, against a security,

[1] In Rice, Equ. Rep., 275, it was held, that "the cases upon the subject establish the principle, that if a joint obligation be created merely by the bond or covenant, where there was no previous liability, in that case no relief will be afforded against the estate of the deceased obligor, in the event of the insolvency of the survivor; but if there was an antecedent debt to which both parties were liable, (as in the case of partners) there the Court infers, without direct proof, that the instrument was made joint by mistake, and relieve accordingly, by setting it up as a joint and several bond."

without positive proof of an express agreement by him, that it should be several, as well as joint.

12. Is there any distinction between the case of a plaintiff, who seeks to reform a contract, and then enforce it, and a defendant who resists its performance, upon the ground of mistake?

The English authorities draw such a distinction, but it has been discarded, with great apparent propriety, by Chancellor Kent. It would seem that an agreement, when corrected, and made to speak the real sense of the parties, ought to be enforced, as any other agreement, perfect in the first instance.[1]

13. Will Equity grant relief, where the parties have omitted any acts or circumstances necessary to give due validity to written instruments?

It will, except where certain formalities are prescribed, on considerations of public policy. Thus it will supply livery of seizin in the passing of a freehold, and omissions in deeds which render them defective at law.

14. Do Courts of Equity relieve against the non-execution, or defective execution of powers, from mistake?

The same principles have been adopted, as in the case of accidents. In favor of the proper parties, Courts of Equity will aid defects in the execution of a power, where they do not go to its substance. The defect may arise either from the improper execution of the appropriate instrument, or the selection of an informal instrument, not within the scope of the power, but not repugnant to its true object.

15. Have Courts of Equity jurisdiction to correct mistakes in wills?

They have, where the mistake is apparent upon the face of the will, or may be clearly made out by a due construction of its terms. Since the statute of Frauds, parol evidence is not admissible, to vary or control the terms of the will, although it is admissible to remove a latent ambiguity. Neither will Equity rectify a mistake, if it does not appear what the testator would have done in the case, if there had been no mistake.

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[1] The same principle was affirmed in 3 Scam., 459.

16. By what principle is the exercise of this jurisdiction limited, in every case of mistake?

The party asking relief must stand upon some Equity, superior to that of the party against whom he asks it. Thus Equity will not relieve against a purchaser for a valuable consideration, without notice.[1]

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[1] Courts of Equity will correct a mistake in a written instrument, even against a surety. 2 Hay., 331; 1 Johns., 607; 1 Call., 418.

CHAPTER VI.

ACTUAL OR POSITIVE FRAUD.

1. WHAT IS FRAUD, AND EXTENT OF EQUITABLE JURISDICTION.
2. RULES OF EVIDENCE, APPLICABLE TO IT IN EQUITY.
3. GENERAL DIVISION OF FRAUDS.
4. WHEN A CONTRACT IS FRAUDULENT BETWEEN THE PARTIES.
5. WHEN WILL A MISREPRESENTATION AMOUNT TO A FRAUD.
6. WHEN WILL AN UNFAIR CONCEALMENT AMOUNT TO A FRAUD.
7. WHERE AN UNDUE ADVANTAGE IS TAKEN OF THE CONDITION OF ONE OF THE PARTIES.
8. WHEN WILL EQUITY PERMIT A LUNATIC TO STULTIFY HIMSELF.
9. HOW DRUNKENNESS AFFECTS CONTRACTS IN EQUITY.
10. CONTRACTS MADE WITH PERSONS IMBECILE OF MIND.
11. CONTRACTS MADE WITH INFANTS.
12. CONTRACTS MADE WITH FEME COVERTS.
13. INADEQUACY OF CONSIDERATION IN CONTRACTS.
14. FRAUDS, OTHER THAN IN MATTERS OF CONTRACT.

1. What is Fraud, and to what extent have Courts of Equity jurisdiction over it?[1]

[1] In relation to frauds it may be observed: First, That the guilty party cannot, except in a few special cases depending upon considerations of public policy, take advantage of his own wrong, to avoid the contract. Second, That the right to avoid a contract or other act, on the ground of fraud, may be lost by long acquiescence after the discovery of the fraud. Third, That a bona fide purchaser, without notice, of a grantee to whom property has been conveyed to defraud creditors, is entitled to hold the same against the creditors of the grantor. 2 Mason,

Fraud is held in such odium by Courts of Equity, that with prospective sagacity, they have always avoided laying down any general exclusive proposition as to what shall constitute it. *Crescit in orbe dolus;* and the possibility will always exist, that human ingenuity may contrive a fraud, which is not embraced within the most extensive definition. It includes, however, all acts, omissions, and concealments, which involve a breach of legal or equitable duty, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. Courts of Chancery, it has been said, possess a jurisdiction to relieve against fraud, concurrent with that belonging to Courts of Law, in every case, except as to fraud in obtaining a will. Where the fraud was practiced on the sale of personal property, their jurisdiction is not co-extensive with that of Courts of Law. They may vacate the whole contract, on the application of the injured party; but will not give relief in damages, as the ascertainment of damages is peculiarly the province of a jury. Their remedial functions extend, however, as well to the case where an act has been prevented, as where it has been induced by fraud.

2. Do Courts of Equity require the same amount of evidence to establish fraud, as Courts of Law?

Fraud will not be presumed, that is, inferred, without examination, in either Court; but it is not necessary to establish it by direct and positive proofs. Courts of Equity have, however, a more extensive and unrestricted jurisdiction in cases of fraud, than Courts of Law, and will sometimes grant relief, on the ground of fraud, established by presumptive evidence, which would not be sufficient to sustain a verdict at law.[1]

252; 4 Rand. 482. This principle was very elaborately sustained by Judge Story, in his opinion in the case in Mason, and it is believed has been generally recognised throughout the United States. This conflicts, however, with the high authority of Chancellor Kent and the Supreme Court of Connecticut. 3 J. Ch. R., 378; 1 Day's R., 527. Fourth. If the principal in a fraud be released, those who are only secondarily liable, cannot be pursued.

[1] Roberts, in his treatise on Fraudulent Conveyances, says: "A man may, in a Court of Equity, be guilty of a *negative* fraud, by his *silence*

3. Under what general division may frauds be arranged?

There are two kinds of fraud in law. The First, which will be considered in this chapter, is actual or positive fraud; as where a man knowingly perpetrates a *fraud*, to the injury of another. The second is *legal* or *constructive* fraud, where, without any reference to the intentions of the parties, the nature and tendency of a transaction are such, as to make it equally reprehensible, in the eye of the law, with positive fraud. It would be obviously impossible to enumerate all the cases which may occur, of actual fraud, and a few examples will be sufficient to show the grounds and modes of equitable relief.

4. What will render a contract fraudulent, as between the parties?

A contract will be fraudulent, where one party uses improper means to mislead the other, in reference to it; or where one party has taken an undue advantage of the condition of the other.

5. When will a misrepresentation, or *suggestio falsi*, constitute a fraud, against the effects of which a Court of Equity will grant relief?

Where one party intentionally misleads another, to his injury, by misrepresenting a material fact, or producing a false impression, in regard to a matter, in which a known trust and confidence was placed in him, it is a fraud, in the truest sense of the term, and a Court of Equity will interfere. It is to be observed, that the misrepresentation may be by acts, as well as words; such are all artifices to disguise the character of a commodity, or to enhance its price. Of this kind is the employment of underbidders at auctions, or other sales, whereby false colors are held out, to surprise the buyer. So far as relief is concerned, it is wholly immaterial whether the party misrepresenting the fact knew it to be false, or made the assertion with-

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on an occasion when *silence speaks;* as where he stands by, and sees another proceed in a transaction under an erroneous impression of facts, which he is able and bound in conscience to remove. Such conduct operates as an equitable *estoppel*, whereby the party guilty of it, having been *silent* when he ought in conscience to have *spoken*, is debarred from *speaking*, when conscience requires him to be *silent*."

out knowing whether it were true or false. The misrepresentation must also be material; that is, it must furnish a motive or inducement to the act of the other party. Thus, if a person should sell an estate to another, representing that it contained a valuable mine, and thereby inducing a purchase, when in fact there was no mine on the estate, the sale might be avoided for fraud; for the misrepresentation touches the very essence of the contract. The misrepresentation must be, farther of a matter, as to which one party is presumed to rely on the statement of the other. As, where a man of known skill in painting sells a picture to another, falsely representing it as the work of an eminent master, the misrepresentation would be sufficient to avoid the sale. But ordinarily, matters of opinion between parties dealing on equal terms, although falsely stated, would not affect a contract; for each man is presumed to depend upon his own skill and judgment. So, the ordinary language of puffing, although false in fact, and bad in morals, is not treated as a fraud. If, however, a misrepresentation has been made, the falsehood of which a purchaser had no means of ascertaining, and by which he was induced to make the contract, a Court of Equity would grant relief. The party must also have been actually deceived by the misrepresentation, to his injury.

6. When will an improper concealment, or suppressio veri, constitute a fraud, against which Equity will relieve?

Where one party suppresses facts, which he was under a legal or equitable obligation to communicate to the other. This obligation exists wherever, from the nature of the contract, or the relations between the parties, a presumption can arise, of confidence reposed by the one in the other. Thus, in cases of insurance, the insured being bound to acquaint the underwriter with all facts and circumstances, material to the risk, within his knowledge, the concealment of them will invalidate the contract. So, where a vendor, knowing that he had no title to an estate, sells it to an innocent vendee, the sale is void, for the very purchase implies a trust and confidence on the part of the vendee, that no such defect exists. And wherever a fiduciary relation, such as principal and agent, guardian and ward, trustee and cestui que trust, subsists, the law requires the utmost

good faith, (*uberrima fides,*) between the parties, and will interpose, wherever there is any reason to suspect the entire fairness of the transaction. This class of cases will, however, be considered under the title of constructive Fraud, to which they properly belong. Mere silence with regard to a material fact, where there is no legal obligation to divulge it, will not avoid a contract.[1] Thus, if A, knowing there is a mine in the land of B, of which he is ignorant, should purchase it, without communicating the fact, for a price which the land was worth without the mine, it would be a valid contract; because A, as the buyer, is not obliged, from the nature of the contract, to make the discovery. On sales of personal property, unless there has been some misrepresentation or warranty, the rule of *caveat emptor* is applied; and the contract is binding, although there may have been intrinsic defects in the subject matter, known to the vendor, and unknown to the vendee, materially affecting its value. Although, however, a Court of Equity will not avoid a contract, because a man of honor would not have entered into it, yet when its aid is sought to carry such a contract into execution, the principles of ethics have a more extensive sway. And a purchase made with such a reservation of superior knowledge, would be of too sharp a character to be enforced by a Court of Chancery.

7. When will the condition of one of the parties to a contract, render it fraudulent?

No contract is valid, where one of the parties was incapable at the time of giving to it a free, deliberate, and intelligent assent, and an undue advantage has been taken by the other, of such inability. To this class belong: First, Contracts made with a man under duress,[2] or in circumstances of extreme distress and necessity. He is regarded as standing *in vinculis,*

[1] Many authorities, including Chancellor Kent, lay down this doctrine with less latitude, and hold, that if one party knows the other to be ignorant of material facts, which are not equally within the reach of his observation, he is bound to communicate them. Vide., 2 Kent, 482; Dev. Eq. R., 18; 2 Tenn., 429; 2 Paige, 390.

[2] Imprisonment under regular legal process, does not constitute such duress, as will invalidate the contract of the prisoner. *Executio juris non habet injuriam.*

and having no free will. Second, Contracts with a man whose judgment has been disturbed by some unexpected circumstance, fraudently induced, to mislead him. Third, Contracts made with a person who is precluded from the possibility of clearly apprehending or intelligently assenting to the terms of an agreement, by mental infirmity. Such are idiots, lunatics, and persons non compos mentis. Contracts with persons in either of these conditions, must be every way just, and for their benefit, or they will not be upheld.

8. How do Courts of Equity regard the Common Law maxim, that a man shall not be permitted to stultify himself?

This maxim, so far as it is preserved by Courts of Common Law, is the relic of a barbarous age. Courts of Equity apply it only to acts, done by the lunatic, in prejudice of others; and not to acts done to his own prejudice; for that would have no foundation in reason or justice.

9. How does drunkenness affect a contract in Courts of Equity?

They will not enforce a contract, which was made in a state of intoxication. But they have refused to set aside contracts, on that ground, unless the drunkenness was excessive,[1] or induced by the fraud of the other party.

10. How are the contracts of persons, who, although not insane, or non compos mentis, are very imbecile of mind, regarded in Equity?[2]

They will be held void, if the nature of the contract justify the conclusion, that the party has not exercised a deliberate

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[1] The drunkenness must be so excessive as to suspend, for a time, the reason of the party, for "the merriment of a cheerful cup, which rather revives the spirits than stupifies the reason, is no hindrance to the contracting of just obligations." In the leading case of Barrat *vs.* Buxton, (2 Ver., 167) it was decided that an obligation, executed by a man when deprived of the use of his understanding by intoxication, was voidable by himself, though the intoxication was voluntary, and not procured through the circumvention of the other party.

[2] Imbecility of mind is not sufficient to set aside a contract, when there is not an essential privation of the reasoning faculties, or an incapacity of understanding and acting in the ordinary affairs of life. Kent's Comm., 2d vol., 452.

judgment, but that he has been imposed upon by artificial or undue influence.

11. How are the contracts of infants regarded in Equity?

Infants, both at Law and in Equity, are generally treated as having no capacity to bind themselves, from the want of sufficient reason and discernment. There are special exceptions to this rule, as where an infant contracts for necessaries, or does an act which the law would have required him to do. Contracts made by infants in favor of persons, knowing their want of discretion and intending to take advantage of them, will be held void, on the ground of their inability to give a deliberate and intelligent consent.

12. How are the contracts of feme coverts regarded in Equity?[1]

A feme covert is treated as a feme sole, as to most acts connected with the control and disposition of her separate estate. In other respects, Equity follows the law, which will not permit a diversity of interests to subsist between husband and wife, and, therefore, deprives the wife of all power to act for herself without his consent, and to protect her from his influence, even disables her from becoming personally bound for contracts, made with his consent, in pais.

13. How will inadequacy of consideration affect a contract, in Equity?

It is not of itself a distinct principle of relief in Equity. Where the contract however, is such, as no man in his senses and free from delusion would make, on the one hand, and no

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[1] The disabilities of infancy and coverture were conferred for protection, and do not authorise fraud. If fraud appears, in any transaction wherein an infant was implicated, of which the infant was conusant, he will be as much bound as an adult. In relation to coverture, there are many cases in which the fraud of a married woman cannot be redressed, without subverting those general laws, which have been wisely enacted for her protection. But a Court of Equity will show its abhorrence of fraud, even when perpetrated by married women, wherever it can be done, without overturning its general policy. Thus, where a *feme covert*, living apart from her husband, has contracted debts, professing to be a *feme sole*, Equity will not interfere for her relief, on a suit being brought against her at law, but will leave her to make the best she can of her formal plea of coveture.

honest and fair man accept, on the other, it will furnish conclusive evidence of fraud, and justify the interference of Equity, on that ground. The inadequacy is so gross, as to shock the moral sense.

14. In what cases of actual fraud, other than in matters of contract, will Courts of Equity give relief?

Such cases may be as numerous as the transactions of human life. Wherever one man deprives another by his fraudulent conduct, of the enjoyment of any right, whether in possession or mere expectancy, he will not only be withheld from reaping the benefit of his own wrong, but suitable redress will be extended to the injured party; even against third persons, who are innocent of the fraud, but not equally entitled to favor Thus, a Court of Equity will establish a will, which has been suppressed through fraud, such an application being viewed with peculiar favor, *in odium spoliatoris;* and they will hold an executor, who has prevented his testator from giving a legacy to a particular person, by promising to pay the sum himself, as a trustee, for that amount to the party who has been thus defrauded of the testator's bounty: and they will not permit a party, who holds a power of appointment for the benefit of others, to use it for the promotion of his own interests; and where a condition has been attached to a legacy, making it liable to be defeated by an act performed without the consent of a certain person, Courts of Equity will relieve against the breach of that condition, where such assent is corruptly withheld. So, they will not permit the forms of justice to be abused by fraud, as in awards, judgments, or decrees. So, in many cases, contracts required by the Statute of Frauds to be in writing, will be supported, although resting merely in parol, if partially executed; on the ground, that a statute made to prevent fraud, should not be used as an instrument of effecting it. And they will not only grant redress where a fraud has been committed, but will, in many cases, interfere to prevent it. These will be considered in a subsequent part of the volume.

CHAPTER VII.

CONSTRUCTIVE FRAUD.

1. MEANING OF CONSTRUCTIVE FRAUD, AND INTO WHAT CLASSES DIVIDED.
2. CASES BELONGING TO THE FIRST CLASS OF CONSTRUCTIVE FRAUDS.
   - I. ACTS OR AGREEMENTS INJURIOUSLY AFFECTING THE MARRIAGE RELATION.
   - II. CONTRACTS OR CONDITIONS ATTACHED TO GIFTS, LEGACIES, OR DEVISES, IN RESTRAINT OF MARRIAGE.
   - III. CONTRACTS IN RESTRAINT OF TRADE GENERALLY.
   - IV. CONTRACTS IN VIOLATION OF LAW OR PUBLIC DUTY, OR TENDING TO DEFEAT THE ADMINISTRATION OF JUSTICE.
   - V. IMMORAL CONTRACTS.
3. WHEN RELIEF IS GRANTED WHERE BOTH PARTIES ARE PARTICEPS CRIMINIS.
4. WHEN ILLEGAL CONTRACTS ARE CAPABLE OF CONFIRMATION.
5. CASES BELONGING TO THE SECOND CLASS OF CONSTRUCTIVE FRAUDS.
   - I. CONTRACTS BETWEEN PARENT AND CHILD.
   - II. CONTRACTS BETWEEN GUARDIAN AND WARD
   - III. CONTRACTS BETWEEN ATTORNEY AND CLIENT.
   - IV. CONTRACTS BETWEEN PRINCIPAL AND AGENT.
   - V. CONTRACTS BETWEEN TRUSTEE AND CERTUI QUE TRUST.
   - VI. CONTRACTS BETWEEN PRINCIPAL AND SURETY, AND ALSO BETWEEN CREDITOR AND PRINCIPAL, AFFECTING SURETY.
6. CASES BELONGING TO THE THIRD CLASS OF CONSTRUCTIVE FRAUDS.
   - I. CONTRACTS OF SEAMEN AS TO THEIR WAGES AND PRIZE MONEY.
   - II. CONTRACTS WITH HEIRS, REVERSIONERS, AND EXPECTANTS.
   - III. POST OBIT BONDS.
   - IV. CONVEYANCES FRAUDULENT AS TO CREDITORS.
   - V. SECRET COMPOSITIONS BETWEEN CREDITORS AND INSOLVENT DEBTOR.
   - VI. UNDERHAND AGREEMENTS OPERATING AS FRAUDS UPON THIRD PERSONS.
   - VII. WHERE ONE MAN DESIGNEDLY PRODUCES A FALSE IMPRESSION UPON ANOTHER TO HIS INJURY.
   - VIII. WHERE ONE MAN PURCHASES WITH FULL NOTICE OF THE ADVERSE TITLE OF ANOTHER.

IX. WHERE THIRD PERSONS COLLUDE WITH FIDUCIARIES IN THE VIOLATION OF THEIR TRUST.
X. CONVEYANCES IN FRAUD OF SUBSEQUENT PURCHASES.
7. EQUITABLE DOCTRINE OF TACKING SECURITIES.

1. What is meant by constructive fraud, and into how many classes is it usually divided.

Constructive fraud includes all acts or contracts, whether originating in an evil design or not, which have a tendency to mislead others, or to violate private or public confidence, or injure the public interests. These are: First, Those which are contrary to some general public policy, or fixed artificial policy of the law; Second, Those in which an advantage has been taken, of a relation of special trust or confidence; Third, Those which operate as a fraud upon third persons, or unconscientiously compromise the interests of the parties themselves.

2. What cases are included under the first class of Constructive Frauds?

First, may be reckoned all acts or agreements injuriously affecting the marriage relation. Marriage is highly favored by the law, and whatever would tend to impair its freedom, purity, or value, is rebuked and discouraged. Therefore, what are called marriage brokage contracts, or agreements to negotiate a marriage between two persons, for a certain compensation, are utterly void, and incapable of confirmation; and even money paid under them, may be reclaimed in Equity. Upon the same principles of policy, all agreements by which parents, or persons standing in loco parentis, are to derive a benefit from giving their consent to a marriage, are void. But where a third person has practiced a fraud upon a parent, to procure his consent to a marriage, he will be prevented from taking any advantage of his own wrong. Thus, where a creditor of the intended husband, misrepresented the amount of the husband's debts to the wife's father, it was treated as a fraud upon the marriage, and he was restrained from the collection of his debt. Nor will either of the parties be permitted to deal fraudulently with the other. On this ground, a secret settlement by a woman, in contemplation of marriage, of her own property, to her separate

use, will be set aside, as a fraud upon the marital rights of her husband.

Second, All contracts, or conditions attached to gifts, legacies, or devises, in restraint of marriages generally, are void, as violating the most important principles of public policy. A contract between a man and a woman to marry each other, is undoubtedly good; but a contract in which one party is restrained from marrying at all, or marrying any body but a particular person, without a corresponding obligation on that person, is void, as injurious to the interests of society, which are promoted by suitable marriages. Thus, an agreement between a man and a woman, by which he promised to pay her a certain sum of money, if he married any other woman, was held to be void. Upon similar considerations, conditions annexed to gifts, legacies, and devises, which directly or virtually operate as an undue restraint upon the freedom of marriage, are invalid. But where the condition is reasonable in itself, and intended by anxious parents or friends to protect the objects of their affection, from the melancholy consequences of improvident marriage, it will be sustained. Such, are conditions, that a son or daughter shall not marry before coming of age, or marry without the consent of certain friends, or marry a particular person. So, a condition that a widow shall not marry, is not unlawful, neither is an annuity during widowhood. In reference to conditions in restraint of marriage, Courts of Equity have established some subtle distinctions. In the case of conditions precedent, where the gift or devise is of real estate, the rule of the Common Law is followed; and the party in whose favor it is made, must strictly comply with the conditions, whatever be their nature, before he will acquire any title to the estate. In case, however, of personal estate, if the condition is in restraint of marriage generally, the legacy will be held good and absolute, as if no condition whatsoever had been annexed to it. Where, however, the condition is of a limited and legal character, but with no bequest over, in case of default, it is yet an unsettled question, whether the condition will be considered as having been made in *terrorem* only, and with no design of imposing a forfeiture, and, therefore, ineffectual. In the case

of real estate, where the condition is subsequent, the necessity of complying with it depends entirely upon its legality. If it is void, it will not divest the estate; but if it be legal, it has the same effect as any other condition, and when broken, will destroy the right of the party holding under it. In reference to personal estate, a condition subsequent in restraint of marriage generally, is treated as a mere nullity. But even if the restraint is of that limited character which the law allows, but with no bequest over upon default, it is treated as having been used merely *in terrorem;* and the legacy becomes absolute and unfettered.

Third, Bargains or contracts in restraint of trade. There is an established distinction, however, between contracts in restraint of trade, generally, which have a tendency to promote monopolies, and discourage industry and enterprise, and agreements in partial restraint of trade, restricting it within certain reasonable limits or times, or confining it to particular persons. Such agreements do not obstruct trade, and may be oftentimes requisite and necessary, as well for public as private advantage. The test of the reasonableness of any restriction on trade is, whether it is such as only affords a fair protection to the party in whose favor it is made, and at the same time does not militate with the public interest. If it is greater than is necessary to insure the protection of the party, it is oppressive, and, therefore, unreasonable, and void.

Fourth, Contracts which violate the obligations of Law or Public Duty.[2] Such are agreements to suppress criminal prosecutions, or to indemnify an officer for the neglect of duty;

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[1] Patented inventions, and secrets of art or trade, not patented, are not within the provision of the rule against restraint of trade; and a trader may sell a secret in his art, and restrain himself generally from the use of it. So, agreements in relation to the disposition and use of patented machines, although in restraint of trade, will be binding, if made within the time to which such patent right is limited.

[2] Although a demand solely depending upon an agreement, as to an illegal transaction, cannot be maintained, a collateral trust may arise, affecting the proceeds of such transaction, which will be executed. Hoveden on Frauds, vol. 1, 164.

all assignments of property amounting to champerty or maintenance; all contracts which tend to impair the purity and freedom of public elections, and all contracts for the buying, selling, or procuring public offices. To this class belong, also, gaming, usurious, and other contracts prohibited by statute. A distinction was formerly drawn between agreements to do, or omit to do, acts that were simply enjoined or prohibited by statute, involving no immorality, and acts that transgressed as well the code of moral, as of legal duties: or between things *mala in se*, and things *mala prohibita*, merely. According to this distinction, unless a statute expressly prohibited contracts which, violated its regulations, they were not void. But this doctrine has been long since abrogated, as utterly unsound, and every act is now considered to be illegal in itself, which is expressly forbidden by statute or otherwise.

Fifth, Immoral contracts. All agreements founded upon considerations *contra bonos mores*, are void. Such are all contracts made upon the consideration of future illicit intercourse and wagers affecting the feelings of third persons, and leading to indecent exposures or examinations. Thus a wager as to the sex of the celebrated Chevalier d'Eon, was held illegal.

3. What principles are applied by Court of Equity to contracts, where both parties are *particeps criminis*?

They generally refuse to grant any relief, acting upon the well-known maxim, *In pari delicto est potior conditio defendentis et posidentis*. Where the agreement or other transaction is repudiated, as contrary to public policy, the circumstance that the relief is asked by a party, who is *particeps criminis*, is not in Equity material. Relief is given to the public through the party. There are many cases, also, where, although both parties have concurred in an illegal act, yet they do not stand in *pari delicto*, for there may be different degrees in their guilt. This distinction obtains in cases of usurious contracts, wherein it is considered that the lender has availed himself of the necessities of the borrower, to extort from him an unlawful rate of interest; and Courts of Equity, as well as Courts of Law, will assist the borrower to recover back the excess paid beyond principal and lawful interest. But if the lender comes

into Equity, seeking to enforce the contract, the Court will refuse any assistance whatever. The same principle, it has been held, did not apply in equal extent to gaming contracts, on the ground that both parties are equally criminal. But the propriety of this distinction may be well doubted.

4. When are illegal contracts capable of confirmation?

The general rule is, that wherever a contract or conveyance is void, upon principles of public policy, it is incapable of confirmation; upon the maxim, *Quod ab initio non valet, in tractu temporis non convalescit.* But where it is merely voidable, or turns upon circumstances of undue advantage, if it is deliberately, and upon full examination, confirmed by the parties, the confirmation will avail to give it an *ex post facto* validity.

5. What cases are included in the second class of constructive frauds, and what are the principles applicable to them?

All cases in which a relation of trust and confidence existing between two persons, has been abused to the injury of one.[1] Whenever a fair, reasonable, judicial doubt exists, whether a party has not availed himself of the opportunities of a confidential situation, to obtain some selfish advantage, Courts of Equity consider the transaction as too suspicious to be allowed to remain in full force.

To this class belong, First, Contracts between parent and child, whereby the latter secures benefits to the former. These must be entered into with scrupulous good faith, and be reasonable in themselves, or they will be set aside, unless third persons have acquired an interest under them.

[1] "In the techinal relations, such as principal and agent, client and attorney, &c., Equity implies a confidence, and in all contracts between them to which the confidence extends, requires of the party in whom the trust is reposed, the highest degree of good faith. On him rests the duty of proving, that the contract is in every respect equal, fair, and equitable. If he fails in this, it is a case of constructive fraud, and avoids the contract. But this rule of Equity is not confined to the confidence incident to the formal relations alluded to; it is applicable to all cases where confidence, on the one hand, and influence on the other, exist, from whatever cause they may spring. He who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence." 5 Black, 532.

Second, Contracts between guardian and ward. This relation involves the most important and delicate trusts, and during its existence, a general disability is imposed upon the parties to deal with each other. Courts of Equity will not even permit transactions between guardian and ward to stand, when they have occurred after the minority has ceased, and the relation actually terminated, unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian. A fair and well considered act of bounty from a ward to his former guardian, is very praiseworthy; but Courts of Equity watch such transactions with almost invincible jealousy, where the connexion has not been long dissolved, and the guardian's account not fully settled. There is ground to apprehend, that the donation in such a case is not the spontaneous tribute of uninfluenced friendship; but rather the impulse of a mind, misled by undue kindness, or forced by oppression.

Third, Contracts between client and attorney. In consequence, not only of the great confidence between the parties to which this relation gives birth, but of the strong influence over the actions and interests of the client, with which it invests the attorney, Courts of Equity have, with a wise providence, established the principle, that during its existence, the attorney shall derive no benefit to himself, from the contracts or the bounty of the client.[1] Such a transaction is not void *ipso facto;* but the burthen of proving its perfect fairness is thrown upon the attorney. A gift made to an attorney *pendente lite*, will be set aside, as arising from the exercise of improper influence: for otherwise there would be no limit to the crushing power of an attorney, who has the affairs of a man in his hands. Where,

[1] An attorney, while the relation subsists, will not be permitted to stipulate for more than a reasonable remuneration for his services. 7 Yerg., 30. An agreement by a client with his attorney, after the latter has been employed in a particular business, by which the original contract is varied, and greater compensation is secured to the counsel, than may have been agreed upon when first retained, is invalid, and cannot be enforced. 3 Porter, 315.

however, the relation has been completely dissolved, and the parties deal with each other at arms length, there is no room for the application of this principle.

Fourth, Contracts between principal and agent. The latter is bound by his contract to afford to the former, the whole benefit of his skill and judgment, and from the confidence which this engagement induces in return, the acts and statements of the agent possess a commanding influence over the mind of the principal. Hence all gifts procured by agents, and purchases made by them, from their principals, are scrutinized with vigilant suspicion. Agents are not permitted to become secret vendors or purchasers of property, which they are authorised to buy or sell for their principals;[1] or to deal validly with them, in any case, except where there is the most entire good faith. The agent must conceal no facts within his knowledge, which might influence the judgment of the principal, as to the price or value of the property sold. A person employed as agent, to buy up the debt of his principal, cannot purchase the debt upon his own account; for he is bound to purchase it at as low a rate as he can; and he would otherwise be tempted to violate his duty. The same rule applies to a surety, who purchases up the debt of his principal; and therefore, in case of such a purchase, the agent or surety can entitle himself, as against his principal, to no more than he has actually paid for the debt.

Fifth, Contracts between trustee and cestui que trust. The same enlarged principles apply to this relation, as to that of guardian and ward. A trustee is never permitted to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid, if it were a case of guardianship. In all cases where a purchase has been made by a trustee, on his own account, of the estate of his cestui que trust, although sold at public auction, it is in the option of the cestui que trust to set aside the sale, whether bona fide made or

[1] There must be two parties to a contract; and it would be an abuse of terms to call that a contract, where an agent sets up a nominal vendee, and clandestinely deals with his own employer, in the name of that person. Such a transaction is in Equity a mere nullity.

not. This doctrine not only applies to trustees, strictly so called, but to other persons standing in a similar situation. Thus, executors or administrators are not permitted to purchase up the debts of the deceased, on their own account; and any advantage thus derived by them, enures to the common benefit of the estate.

Sixth, Contracts between principal and surety, and also between principal and creditor, affecting surety. The contract of suretyship imports entire good faith between the parties, in regard to the whole transaction. Any concealment of material facts; or any express or implied misrepresentation of such facts; or any undue advantage taken of the surety by the creditor, either by surprise, or by withholding proper information, will undoubtedly furnish sufficient ground to invalidate the contract. For the same reason the creditor is, in all subsequent transactions with the debtor, bound to equal good faith towards the surety. If any stipulations, therefore, are made, between the creditor and the debtor, which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from his obligation; and any additional security obtained by the creditor from the debtor, will enure to the benefit of the security. Nor can the creditor, when required by the surety, omit to do any acts enjoined by his duty, else such omission may be set up by the latter, at least in Equity, as a defence to any suit brought against him. Mere delay on the part of the creditor to collect his debt will not discharge the security. There must be some binding stipulation for the delay, before the surety can take advantage of it. So, if the creditor loses any collateral security by his gross negligence, or parts with it without the consent of the surety, it will operate, pro tanto, as a discharge of the latter. When a debt has become due, the surety may come into Equity, and require the debtor to pay the claim, and exonerate him from liability; and it is said, that under similar circumstances, he may compel the creditor to proceed in its collection, at least on full indemnity for the risk and expense of the suit, being tendered. Whether this is so or not, he has a clear right, on payment of

the debt, to be substituted in the place of the creditor, to the benefit of all securities for its satisfaction, which he may hold.[1]

4. What cases belong to the third class of constructive Frauds?

The most numerous are where the act or contract is substantially a fraud upon the rights or interests of third persons. The act, or contract, must not only be bona fide between the parties, but must not be mala fide as to third persons.

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[1] The relation of principal and surety, with the rights and obligations growing out of it, has been the subject of frequent and learned discussion in the American Courts. Some of the most important decisions pertinent to the doctrines stated in the text, are digested below. There are two general principles governing this relation. First, the engagement of a surety is only accessory to a principal obligation, without which it cannot exist. Wherever, therefore, the principal is discharged, in whatever manner it may be, the surety is likewise discharged. Second, the debt for which he has become bound, cannot be changed without his assent, into a new debt; and, therefore, any variation from the original agreement will enure to his discharge.

1. It is a question of great importance, and one on which the authorities are by no means unanimous, whether the relation of principal and surety exists after judgment. Chancellor Kent held, in 5 John, Chy. R., 305, that after judgment against a surety, he becomes bound, as a principal debtor, and that it is then too late to inquire into the antecedent relations between the parties. The same principle is affirmed in 10 Yerg., 111, and in 2 McLean, 52. In the latter case, a decision of the Supreme Court of the United States, in 3 Wheaton, 520, is cited as an authority in point. We humbly apprehend, that this principle is not necessarily implied in the opinion of the Court in that case, and was not essential to the adjudication of the point before them. It is certainly not sustained by the abstract of the reporter, which is in these words: "The endorser of a promissory note, who has been charged by due notice of the default of the maker, is not entitled to the protection of a Court of Equity, *as a surety;* the holder may proceed against either party, at his pleasure, and does not discharge the endorser by not issuing or by countermanding an execution against the maker." It is rather to be inferred from this abstract, that the endorser ceases to occupy the relation of surety, after default on the part of the maker, and due notice to himself, and becomes absolutely bound for the debt, and, therefore, cannot claim that equitable protection, which is extended to the surety. Although there are conflicting decisions, yet the weight of authority is in favor of this position. Nothing, it is believed, can be drawn from the case in

Very many cases may be included which have been partially considered before. There is, in almost every instance, either some taint of positive fraud, or the parties stand in some peculiar predicament, or are in some manner under the protection of the law, from age, character, or relationship.

First, Contracts made with seamen for their wages, or prize money. This gallant class of men are so improvident in their habits, that they seem to require guardianship during the whole course of their lives. Hence Courts of Equity extend to their interests a most indulgent consideration, and will grant relief, wherever any undue advantage has been taken of them.

Second, Contracts, usually called catching bargains, with heirs, reversioners, and expectants, during the life of their parents, or other ancestors. Courts of Equity have extended a degree of protection to these parties, almost imposing an incapacity to bind themselves absolutely by any contract. Mere inadequacy of compensation is sufficient to set aside the contract; and it is, in every instance, incumbent upon the person dealing with the heir, or expectant, not merely to establish the absence of fraud, but, (as the phrase is,) to make good the bar-

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Wheaton, to show that where the relation subsists up to the time of judgment, it is thereby merged. In Virginia, Kentucky, Mississippi, and Ohio, a different doctrine has been established, and the relation of principal and surety continues after judgment. Chancellor Buckner says, in 1 Freem., 571, "I perceive no solid reason for dispensing with the same measure of good faith on the part of the creditor towards a surety, after judgment, which he is required to observe before judgment. The whole doctrine of Equity, in extending relief to sureties, rests upon the moral and equitable obligation of the creditor to obtain payment from the principal debtor, or at least to do no act by which the liability of the surety is increased, or the means of recovering the debt from the principal may be lost. It is difficult to see how the act of the creditor, in reducing his debts to a judgment, can absolve him from any pre-existing duty, which he owed to the surety, or take away the right of the surety to avail himself of any subsequent act of the creditor, by which the payment of the debt is sought to be exclusively and unjustly thrown upon him without the hope of remuneration. Vide., also 4 How., 684; 1 Call., 18; 1 Munf., 269; 1 Leigh., 436; 4 Leigh., 426; 7 Leigh., 244, 3 J. J. Marsh., 527; 4 J. J. Marsh., 440; 3 Bibb, 467; 3 Ohio, 280; 11 Ohio, 444.

gain; that is, to show that a full and adequate consideration has been paid. The doctrine upon this subject is founded upon two presumptions: first, that the heir, or reversioner, is defenceless, and exposed to imposition by the pressure of necessity; and second, that the transaction operates as a fraud upon the parent or ancestor, who, from ignorance of it, is misled in the disposition of his property. There are two qualifications, then, of the doctrine, either of which, however, will be sufficient to establish a case of constructive fraud. The heir, or expectant, must make the contract under circumstances of distress, which furnish strong temptations to the undue sacrifice of his future interests; and the parent or person standing in loco parentis, must be ignorant of the transaction, otherwise this disposition of the Court to protect their interests, might be made the instrument of effecting the greatest frauds.

Third, *Post obit* bonds. A *post obit* bond is an agreement

2. It is a point not fully settled, whether a surety will be released at law, if the creditor, on being requested to proceed against the principal, fails to do so, until he becomes insolvent. Such a rule was laid down in New York, in 17 John., 384, 13 John., 174, and has been adopted in Alabama and Tennessee. But the weight of authority, including that Chancellor Kent, is against the rule, Vide., 5 How., 694, and 2 McLean, 452, where the doctrine is very elaborately examined. It seems, however, to be conceded, that a surety, apprehending danger from the delay of the creditor, may come into Equity and compel the creditor to sue the principal debtor, on giving an indemnity against the consequences of risk, delay, and expense. 4 John., Chy. Rep. 129; 1 McLean, 180.

3. A surety has a right to stand upon the very terms of his contract, and any variation in it, made without his assent, is fatal. And it will make no difference, even if the change is for his benefit. 9 Wheat., 680; 8 Wendel, 512; 6 Gill. and Johns., 243. So, the contract of the surety is to be strictly interpreted both at law and in Equity, and cannot be extended by implication beyond its terms. 9 Wheat., 680; 3 Scam., 136.

4. Any binding agreement between a creditor and a debtor, by which the hands of the former are tied up for a single moment from proceeding against the latter, if required to do so by the surety, will discharge the surety. So, any relinquishment of securities, or release of liens, will enure to the discharge of the surety; but not a loss of liens arising from a mere omission to act. 3 J. J. Marsh., 526; 4 Leigh., 622; 3 Paige, 650; 13 Ohio, 84. In the last cited case, the whole doctrine on this subject is examined with great learning, in the arguments of counsel.

on the receipt of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, upon the death of the person, from whom he has expectations, if he should survive him. Such contracts generally operate as a fraud upon the bounty of the ancestor, and are introductive of the worst public mischiefs. They are not, however, in all cases utterly void. They may be made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard. If they are not tainted with actual fraud, Courts of Equity will permit them to stand, as securities for the sum, to which ex æquo et bono, the lender is entitled. Such agreements are capable of confirmation under circumstances, in which a deliberate and intelligent assent may be presumed. The sale of a post obit bond at auction, will not, however, as in the case of a reversion, repel the suspicion of distress and embarrassment; but on the contrary, raises a violent presumption of necessity and improvidence.

Fourth, Conveyances, in fraud of creditors.[1] By the statute of 13th Elizabeth, ch. 5, conveyances of lands, goods or chattels, to defeat or delay creditors, are declared fraudulent and void. This statute has been universally adopted in America, as the basis of our jurisprudence on the same subject; and according to the decision of the Supreme Court of the United States, in Hamilton *vs.* Russell, 1 Cranch 309, both the statute of 13th and 27th Elizabeth, are only declaratory of the principles of the Common Law. These statutes have always received in Courts of Law and Equity a liberal interpretation, as they were designed to suppress fraud. All voluntary conveyances are not void; but only such as are fraudulent. A voluntary conveyance which is bona fide, and upon good consideration, is not only valid between the parties, but also as against all other persons. A good consideration includes both a valuable consideration, such as money, marriage, or the like, and a meritorious consideration, such as a relation of blood, or affection.[2] A

[1] A creditor cannot come into a Court of Equity to set aside a conveyance as fraudulent, until his debt has been ascertained and established by a judgment at law. 2 Johns. Chy. Rep., 144; 1 Litt., 305; 1 Mon., 106; 1 Paige, 305; 1 Hawks., 85; 2 Leigh., 84; 3 Leigh., 299.

[2] It is clearly settled, that a voluntary settlement, even in favor of

conveyance is not bona fide which withdraws from the reach of creditors property which should have been applied to the satisfaction of their debts; or which is made, whether on a valuable consideration or not, for the purpose of defrauding creditors. The doctrine established by the Supreme Court of the United States, and which generally prevails in the country, is, that a voluntary conveyance made by a person, not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors, upon the mere ground of its being voluntary. It must be shown to be fraudulent, or made with a view to future debts. And on the other hand, the mere fact of indebtment at the time, does not, *per se*, constitute a substantive ground to avoid a voluntary conveyance for fraud, even in regard to prior creditors. The question, whether it is fraudulent or not, is to be ascertained, not from the mere fact of indebtment at the time, alone, but from all the circumstances of the case. And if the circumstances do not establish fraud, then the voluntary conveyance is deemed to be above all exception. These positions are supported by the latest English authorities, if indeed (which may be questioned) they are inconsistent with the earlier cases. Chancellor Kent, however, has declared a different doctrine, in which he is sustained by high authority. "Fraud in a voluntary settlement is," he says, "an inference of law, and ought to be so, so far as it concerns *existing* debts. No circumstances will repel this legal presumption, as it does not depend upon the amount of the debt, or the extent of the property in settlement, or the condition of the party. But as to subsequent debts, there is no such necessary legal presumption, and there must be proof of fraud in fact; and the indebtment at the time, though not amounting to insolvency, must be such as to warrant that conclusion." A conveyance will also be void, although on a valuable consideration, which was made for the purpose of defeating or delaying creditors. As if a man should know of a judgment and execution, and with a view of defeating it should purchase the debtor's goods, it would be void;

strangers, by one not indebted at the time, and meaning no fraud, is good against subsequent creditors. Vide., Roberts on Fraudulent conveyances, 67th page, and cases there cited.

because the object is iniquitous. It has been finally established in England, though not without much discussion, that to make a voluntary settlement, void against creditors, either existing or subsequent, it must transfer property which would be liable to be taken in execution for the payment of debts, on the ground that the statute of Elizabeth did not intend to enlarge the remedies of creditors, by subjecting property to the satisfaction of their claims, not before liable to them, either at law or in Equity. Chancellor Kent, however, has held that a Court of Equity ought to interfere, and grant remedial justice, whether the property could be reached by an execution at law or not; for otherwise a debtor might convert all his property into stock, and settle it upon his family, in defiance of his creditors, and to the utter subversion of justice. It may be remarked in addition, on this subject: First, that a conveyance, giving preference in payment to one creditor over another, will not be void, because it thereby operates to the prejudice of the other.[1] Second, that although voluntary conveyances may be void as to existing creditors, they are good as between the parties. Third, that although there are cases in which a settlement made upon a wife after marriage, will not be treated as voluntary, (for example, where it is done in performance of a duty, which a Court of Equity would enforce,) yet a settlement made after marriage in pursuance of a parol ante nuptial agreement, will not be valid against creditors, in cases affected by the statute of frauds. Fourth, that, although in England, voluntary convey-

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[1] It may be added, 1. That the object of the statute of Elizabeth was to prevent deeds, fraudulent in their inception and intention, and not such as in their effect might hinder or delay creditors. It is the corrupt and covenous motive, the mind with which a deed is made or act done, that gives it character, without the existenee, or presumed existence, of which fraud is not imputed. The intention and motive of a party making a conveyance, is to be ascertained by the facts and circumstances appearing in the case. B. Monroe, 42 and 430.

2. That a debtor cannot make a reservation in such an assignment, of any part of his property, for his own benefit, at the expense of his creditors. It has been a vexed question in this country, whether a debtor may rightfully stipulate for a release from his creditors, as a condition of such assignment. The weight of American authority is in favor of

ances of lands cannot be set aside, except by creditors who have reduced their debts to judgment before the death of the party, for until that time they constitute no lien on the land; yet in America, generally, lands having been made assets for the payment of debts, as auxiliary to the personal property, will not be affected by any conveyance of the debtor in his life time, designed to defeat creditors on his decease. Fifth, that Courts of Equity will not grant relief, where the property has been conveyed by the voluntary or covenous grantee, to a purchaser for a valuable consideration, without notice. His Equity is equal to that of any other person, whether a creditor or purchaser of the grantor; and where the Equity is equal, *Potior est conditio possidentis.*

Fifth, Secret compositions between an insolvent debtor and his creditors. Such agreements, by which one creditor secures to himself more favorable terms than the general deed of composition warrants, act as decoy ducks upon the other creditors, and mislead them by holding out false colors. For it is an implied term in every deed of composition, that one creditor shall not be in a better condition, as to the payment of his debts, than another; unless, indeed, it is expressly provided otherwise. Courts of Equity accordingly consider such arrangements as utterly void, and not proper to be enforced even against the assenting debtor or his sureties. These secret bargains are not only incapable of confirmation, but money paid under them may be recovered back, as having been obtained against the clear principles of public policy.

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the validity of such a stipulation. In England such a stipulation has been held good, even as against the crown. The question is very elaborately examined in 6 Missouri Rep., 302, where the deed was declared void, and in 4 Mason, 206, where it was supported. The decisions in New York and Ohio are against the validity of an assignment with such a clause of release. 5 Ohio, 293; 7 Ohio, 2d part, 246; 8 Ohio, 390; 14 Johnson, 459; 5 Johnson Ch. R., 329; 4 Paige, 23; 6 Connecticut, 277.

3. A corporation may also, like an individual, give preferences among creditors, when honestly and fairly intended and done. The doctrine is well established in Equity. Vide., Kent's Comm., vol. 2, 315, and Angell and Ames on Corporations, 126.

Sixth, Underhand agreements, operating as a fraud upon third persons.[1] These will be set aside in Equity, upon the general principles which have been previously stated. Thus, where one man procures from another the guaranty of a debt, by suppressing material circumstances, it is a fraud, and will avoid the contract.

Seventh, Where one person designedly produces a false impression upon another, to his injury. A party who enables another to commit a fraud, is answerable for the consequences. Thus, where a man knowing that an estate belongs to him, which is offered by another person for sale, stands by and permits a third party to purchase, under the supposition of a clear title, neither he nor his privies will be allowed to dispute the validity of the purchase. So, where a man builds upon land, supposing that he has a perfect title to it, and the real owner stands by, and suffers the erections to proceed without giving notice of his claim, he will not be permitted to avail himself of such improvements, without paying a full compensation therefor. Also, where a person having an incumbrance or security upon an estate, suffers the owner to procure additional money, by way of mortgage, on it, concealing his prior incumbrance, he will be postponed to the second incumbrancer; for it would be inequitable to permit him to profit by his own wrong, in concealing the claim, and thus lending encouragment to the new loan. Indeed, cases of this sort are viewed with so much disfavor by Courts of Equity, that neither infancy nor coverture will constitute any excuse for the concealment or misrepresentation.

Eighth, Where a person purchases, with full notice of the legal or equitable title of another to the same property. In all such cases, Courts of Equity will hold the purchaser a trustee, for the benefit of those whose rights he has sought to defraud;

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[1] In Weed and Weed *vs.* Bentley, 6 Hill, 56, it was held, that where on a composition between a creditor and debtor, they induced a third person to become a surety for the payment of one half the debt, by representing to him that it was in full of all demands, and the debtor, in pursuance of a previous arrangement of which the surety was unapprised, gave his own note for the additional sum, the note having been given in fraud of the surety, the creditor could not enforce it.

for by his conduct he has become *particeps criminis* with the fraudulent grantor. The illustrations of this doctrine may be multiplied to any extent. Thus, where a man buys land, knowing that it has been previously sold, a Court of Equity will regard him as standing in the place of his vendor, and bound to do the same acts. So a subsequent purchaser, who had at the time notice of a prior unregistered conveyance, will be postponed to it, in Equity. But, as this doctrine breaks in upon the policy of the registry acts, it is only applied to cases where the notice of a prior right is so clearly proved as to make the person, subsequently acquiring the legal estate, a *mala fide* purchaser. Notice is of two kinds; actual or positive, and constructive. The latter is nothing more than such evidence of notice, as will raise a presumption, which the law does not allow to be controverted. Where a purchaser cannot make out his title, but by a deed, which leads to another fact, he shall be presumed to have a knowledge of that fact. So, the purchaser is supposed to have knowledge of the instrument, under which the party with whom he contracts, as executor, or appointee, denies his power. Whatever is sufficient to put a party upon inquiry, is held to be good notice to bind him. Thus, notice of a lease, will be notice of its contents. So, a person purchasing an estate, in the possession of tenants, is bound to inquire into the extent of their interests. In England, the mere registration of a conveyance, is not deemed constructive notice to subsequent purchasers. But the opposite doctrine universally prevails in America. This is not to be understood, however, of all conveyances, or deeds, which may be *de facto* registered; but of those only authorised and required to be registered by law, and duly registered in compliance therewith. Upon similar grounds, a purchase made of property, actually in litigation, *pendente lite*, although for a valuable consideration, and without express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the decree or judgment in the case.[1] Where no-

[1] A bill in Chancery against an absent defendant, is not a *lis pendens*, so as to operate as constructive notice to a purchaser, until the order to advertise has been executed. 4 Bibb, 498; 5 Ohio, 461.

tice is brought home to the agent or attorney, the law presumes notice in the principal, since it would be a breach of trust in the former not to communicate his knowledge to the latter.[1] The notice, however to bind the principal in these cases, should be notice in the same transaction or negotiation. A *bona fide* purchaser of an estate for a valuable consideration, without notice, purges away the Equity from the estate in the hands of all persons, who may derive title under it, with the exception of the original party, whose conscience remains bound by the violation of his trust. So that, both a bona fide purchase without notice, from one affected by it, and a purchase with notice, from one who acquired his title without it, are protected in Equity.

Ninth, Collusion with fiduciaries, in violation of their trust. A purchaser of personal property, from an executor or administrator, cannot be presumed to know, that such sale may not be necessary to discharge the debts of the deceased; but if he is in fact privy to a misapplication of the assets of the estate, he will became *particeps criminis*, and his purchase be set aside as fraudulent. On similar principles, where the personal representative of an estate is colluding with a debtor, either to retain or waste the assets, the latter may be pursued at once in Equity by a creditor or legatee, the executor or administrator being made a party to the writ. So, in cases of collusion between mortgagor and mortgagee, the creditors of the former have a right to redeem, and call for an account.

Tenth, Conveyances in fraud of subsequent purchasers. Under the statute of 27th Elizabeth, which was designed to protect subsequent purchasers from the grantor, against mere volunteers under prior conveyances, it has been established in England, after no inconsiderable diversity of judicial opinion,

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[1] The general principle, that notice to a trustee or agent, is notice to the *cestui que* trust or employer, does not extend to the case of an assignee in a deed of trust, made for the benefit of creditors, without their knowledge or assent, at the time of its execution. In such a case the assignee is the trustee of the obligor, and not of the creditors; and notice to him that the assignor had some intent in making the conveyance contrary to the general policy of the law, will not avoid it as to creditors. 11 Wheat., 87.

that all voluntary conveyances of real estate, although made bona fide, and without the slightest admixture of intentional fraud, are void against subsequent purchasers, whether with or without notice. This doctrine, however, which has little foundation in just reason, and rather owes it existence to a desire to give repose to titles, fairly acquired under it, only prevails between purchasers, strictly so called, and not between successive voluntary conveyances. The better American doctrine, (though not without a similar diversity of opinion, at least at a former time,) now seems to be, that a voluntary conveyance of land, bona fide made, and not originally fraudulent, is valid against subsequent purchasers. The Supreme Court of the United States, in Cathcart *vs.* Robinson, 5 Peters, 264, held, that the principle of the construction of the statute of 27th Elizabeth, which prevailed in England at the commencement of the American Revolution, went no further than to hold the subsequent sale, to be presumptive and not conclusive evidence of a fraudulent intent, in making the prior voluntary conveyance. In favor of a subsequent purchaser without notice, the Court adopted this construction, and declined to follow that which had been subsequently established at Westminster Hall.

7. What is the doctrine of tacking securities?

In England, a junior mortgagee, by purchasing an antecedent incumbrance, may unite the securities, provided they are held in the same right, so as to prevent any intermediate incumbrancer from claiming to redeem the lien which is prior, without also redeeming that which is subsequent to his own title. The rights, however, only exist in favor of a bona fide purchaser of an interest in the land, for a valuable consideration, without notice of the prior incumbrance, at the time he took his original security. A creditor by judgment, is not such a purchaser; as he did not advance his money upon the immediate credit of the land, nor acquire by his judgment any right in the land. The doctrine of tacking has been called a tabula in naufragio, and is founded upon the assumption, that the equities between the second and third incumbrancers are equal, and, therefore, that the latter, having acquired the legal title, should prevail. But this is not true in fact. He who has been fairly prior in point

of time, has the better equity, for he is prior in point of right. The junior party who acquires an antecedent incumbrance, is justly entitled to be substituted to the rights of such prior incumbrancer, over the purchased security, and nothing more. In the United States, the English law of tacking is very generally exploded. Liens are to be paid according to the order of time in which they respectively attached. Such is the policy and meaning of our registry acts.[1]

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[1] "Grant *vs.* United States Bank, 1 Caines' cases in Error, 112, was the earliest case," says Chancellor Kent, in his Commentaries, vol. 4, page 178, "that I am aware of in this country, destroying the system of tacking. In that case, I had the satisfaction of hearing that profound civilian, as well as illustrious statesman, General Hamilton, make a masterly attack upon the doctrine, which he insisted was founded upon a system of artificial reasoning, and encouraged fraud." See, also, 11 Serg. and Rawle, 223; 3 Pick., 59; 6 Munf., 560.

CHAPTER VIII.

ACCOUNT.

1. ACTION OF ACCOUNT AT COMMON LAW.
2. GROUNDS AND LIMITS OF EQUITABLE JURISDICTION IN MATTERS OF ACCOUNT.
3. RULE AS TO THE APPROPRIATION OF PAYMENTS.
4. LIGHT, IN WHICH COURTS OF EQUITY REGARD THE PARTIES TO A BILL FOR AN ACCOUNT.
5. PRINCIPLES APPLICABLE TO STATED ACCOUNTS.
6. HOW BILL FOR ACCOUNT AFFECTED BY THE LAPSE OF TIME.
7. WHAT SUBJECTS EMBRACED UNDER THE EQUITABLE JURISDICTION OVER ACCOUNTS.
8. FOUNDATION AND EXTENT OF THE JURISDICTION OVER ACCOUNTS CONNECTED WITH AGENCY.
9. CONSEQUENCES OF MISCONDUCT TO AN AGENT, IN EQUITY.
10. APPORTIONMENT AT LAW, AND IN EQUITY.
11. JURISDICTION IN CASES OF GENERAL AVERAGE.
12. WHEN, AND ON WHAT PRINCIPLES COURTS OF EQUITY ENFORCE CONTRIBUTION.
13. PRINCIPLES OF CONTRIBUTION BETWEEN CO-SURETIES.
14. JURISDICTION IN CASES OF LIEN.
15. WHEN ACCOUNT WILL BE DECREED OF RENTS AND PROFITS.
16. ACCOUNT IN CASES OF WASTE.

1. When did an action of Account lie at Common Law?

In cases only, where there was privity between the parties; either in fact, as against a bailiff, or in law, as against a guardian in rocage. For the benefit of trade, the rule was so extended as

to embrace merchants; one of whom, naming himself a merchant, might have an account against another, naming him as merchant, and charge him as receiver. It did not lie, without some special contract between them, by one joint tenant, or tenant in common, against the other, for receiving more than his share, nor against wrong doers, nor by or against executors, or administrators.

2. What are the grounds and limits of equitable jurisdiction in matters of account?[1]

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[1] "It has already been stated that the jurisdictions of law and equity were concurrent in matters of account. Some difference of opinion has, in consequence, existed among jurists as to the relative advantages of the two modes of proceeding. Chancellor Kent observed, (3 J. C. R. 360) that in account render, "the auditors have all the requisite powers; for they can compel the parties to account and to be examined under oath; and I have not been able to discern any good reason why that action has fallen into disuse." On the other hand, Mr. J. Wilson, who was practically acquainted with the common law proceeding, has said, that a Court of Chancery is necessary in Pennsylvania, if it were only for the settlement of accounts. (2 Wils. works, 284.) In theory there seems but little difference in the forms and respective advantages of the two methods. The stages of litigation are precisely the same. The decree of an account, and the judgment *quod computet*, the reference to masters and auditors, and the final decree and judgment after report made, possess no important intrinsic advantages over each other. As to the charge of dilatoriness, it is inseperable from the nature of mutual accounts, and necessarily belongs to the subject matter, whether in law or equity. The true reason of the obsoleteness of the action of account render, is perhaps to be found in the intricacies of practice attached to it by the ancient lawyers. At the time when that action was most in use, scholastic subtilty prevailed in jurisprudence, as in the other sciences, and was generally received and mistaken for learning. The subject of accounts is itself so complicated, that it requires all the facilities which liberality can give it, to render it amenable to judicial forms. In a field so predisposed, the favorite subtilties of the age grew up with unusual vigor. Interminable pleadings were made to heap issue upon issue. Intricacies of evidence were introduced, where the most free admission of testimony was required. The *forms* of action which are only intended to protect the *substance*, began to assume a primary importance and to be regarded as the conditions of justice. In this manner, account render became, what one of its modern eulogists was compelled to admit it to be, a chaos of clashing notes, hints, and cases; (Wilmot J. 3

The equitable jurisdiction is mainly derived from three sources. First, the want of any remedy at law. Second, the inadequacy of the legal remedy, and the capacity of the Courts of Equity alone, to administer complete justice, through their power of compelling a discovery, of bringing before them all parties in interest, and of moulding their decrees, so as to adjust the complicated equities of each case. Third, as incident to relief, where the jurisdiction has previously attached on distinct grounds—and to prevent multiplicity of suits, as in cases of accident, fraud, and mistake. The jurisdiction is universal, wherever the account stands upon equitable claims, or has equitable trusts attached to it. Courts of Equity have also a general jurisdiction, in matters of account growing out of privity of contract, where the accounts are mutual, or where the accounts are on one side, but a discovery is sought and is material to the relief. Where, however, the accounts are all on one side and no

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Wils. Rep. 113, 117,) and the Court of Chancery availing itself, as usual, of the illiberality of the common lawyers, raised up a new and important branch of jurisdiction. In Pennsylvania, where there is no Court of Chancery, the action of account render, is familiarly brought for the settlement of accounts of a complicated nature, particularly such as relate to partnerships. It was taken up with all its inconveniences, because as these were settled common law, no power short of the Legislature could correct them. It must be confessed, therefore, that the action sometimes presents great difficulties, and would be still more unmanageable, but for the liberality of counsel. On the whole, the experiment may be considered as successful, for practice has simplified much that was once difficult. With a few regulations in relation to the joinder of parties, the consolidation of issues, and the pleadings and judgments, the action would be in every respect equal to the Chancery proceeding. It possesses, in some points, a decided superiority. One of these, the reference to merchants as auditors, instead of masters in Chancery, was properly appreciated by Chancellor Kent, (3 J. C. R., 361,) who referred to the frequent necessity that existed of appointing a skilful accountant to assist the master in taking and stating the account." Laussat's note to Fonblanque's Equity, page 472. McMurray *vs.* Rawson, 3rd Hills Rep. 59, is a case of great learning, on the common law action of account. The Court say, that it is one of the most difficult, dilatory, and expensive actions known to the law; and parties resorting to it, must be held to the ancient rules of pleading, subject only to such alterations as may have been made by the Legislature.

discovery is sought or required; or where there is a single matter on the side of the plaintiff seeking relief, and mere set offs on the other side, and no discovery is sought or required, Courts of Equity will decline taking jurisdiction of the cause.[1]

3. What is the rule as to the appropriation of payments?

The debtor has, in every instance, the right to appropriate any payment, to such debt of his creditor, as he may choose. If the debtor omits to make any such appropriation, the creditor may do it, provided the right is exercised at the time.[2] And if neither party make an appropriation, the law will do it in a manner that will be fair and equal to both.[3] It is probable, however, that in analogy to the civil law, the right of a creditor

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[1] "In consequence of the inadequacy of the remedy at law by the old action of account, and the great delay and expense of that mode of procedure, Courts of Chancery began to take cognisance, and have gradually enlarged their jurisdiction, until it has become concurrent with that of the common law courts, to an almost unlimited extent, over the mutual dealings of parties; even when those dealings consist of items of a purely legal character. But a distinction exists in the power of the two tribunals. It is certain that over multifarious and complicated mutual dealings a Court of Equity has jurisdiction, and that it has none over accounts, consisting of but one item on a side: while the power of a law court, embraces both extremes. So, equity has no jurisdiction over accounts, however numerous and important the charges, where there is no mutuality of dealing, and a discovery is not required; but law has." Cummins v. White. 4 Blackford, Rep. 359.

[2] The creditor is not bound to make an immediate decision as to the particular debts or accounts, to which he will appropriate payments, where there are several debts or accounts, or where there is a running account; but he will be allowed a reasonable time to decide, to which account or debt he will place it. When once he has made his election, he will be bound thereby. 9th Wheaton, 724; 12th Serg. & Rawl, 305.

[3] If neither the debtor, nor the creditor has made the application of payments; the Court will apply them to the debts for which the security is most precarious. 6 Cranch 8. 1 Free, 502. 4 J. J. Mars. 97. But generally a Court of Equity will apply a payment, to a demand bearing interest, where there is another not bearing interest. 5 Monroe, 253; 1 Bibb, 334. In 9 Cow. Rep. 747, where this whole doctrine was most learnedly examined, it was held, that in the case of a debt by mortgage, and also by account, and no application made, by either debtor or cred-

to elect, to which debt, an indefinite payment shall be applied, will be confined to cases, where such an election cannot affect the interests of the debtor.[1] Where, however, it is most to the benefit of the debtor, that the payment should be applied to a particular debt, as if one carries interest, and the other does not, there it is presumed that, in the absence of all directions by the debtor, the law will make such an appropriation as is consistent with equality and justice. In cases of running accounts between parties, where there are various items of debt on one side, and various items of credit on the other, occurring at different times, and no special appropriation of the payments is made by either party, the successive payments or credits, are to be applied to the discharge of the items of debit, antecedently due, in the order of time in which they stand in the account.

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itor, of money paid generally, the law will apply the payment to the mortgage in preference to the account; because relief from the former will be most beneficial to the debtor. The Supreme Court of Connecticut, have held that where the appropriation of payments devolved upon the Court, the application would be so made, as to work the greatest equity, under all the circumstances, or to carry out the intention of the parties, if it can be ascertained. Thus, payments will be sometimes applied to the oldest demands, and sometimes to the most precarious, but never to a demand not due, in preference to one due. 15 Conn. Rep. 437. In Virginia, in a late case, the Court of Appeals say that the application will be made by the Court, not according to any settled rule as to the intention of the parties, but according to the justice of the particular case. 11 Leigh. 512; vide also 5 Peters, U. S. Rep. 160.

[1] Judge Story, in 3 Sumn. 110, and Justice Cowen, in 9 Cow., 747, have manifested a decided inclination to adopt the rule of the Roman Law. Similar views are sustained in an article in the American Law Magazine, Vol. 1, page 31. In 6 Watts & Serg. 9, however, the Supreme Court of Pennsylvania held, that the provisions of the Roman Law, which in the application of a payment, required the creditor, when the right has devolved on him by the laches of the debtor, to consult the debtor's interest, in preference to his own, has not been adopted as a part of the common law; and the propriety of an instant and actual application, by a creditor firm, of the proceeds of a separate note transferred to it, generally, as a collateral security, without specifying for what debt, by a partner indebted to it on joint and separate account, cannot be questioned.

And this rule applies as well, where a part of the debt is secured by a guaranty.[1] Where there are no running accounts, if no special appropriation is made by the debtor, the creditor may apply the money to any demand which he has against the debtor, whether it be a balance of an old account, or a new account.

4. How are the parties to a bill for an account regarded in Equity?[2]

When the cause is before the Court upon its merits, they are both considered as actors, and the defendant is not only entitled to interlocutory orders, contrary to the usual course of Equity proceedings, but if a balance is ultimately found in his favor, he may obtain a decree against the plaintiff, for the amount.

5. What principles are applicable to stated accounts?

It is ordinarily a good bar to a suit for an account, that the parties have already, in writing, stated and adjusted the items of the account, and struck the balance. Where, however, there has been gross fraud, or mistake, the court will direct the whole account to be opened, and taken de novo. If the fraud, or mistake, does not stain all the items, the Court will allow the account to stand, with liberty to the plaintiff to surcharge and falsify it, the effect of which is to leave the account in full force and vigor, as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof

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[1] In 7th Cranch, 572; 2 McLean, 501; and 1 How. 250, it was held, that the rule adopted in ordinary cases, did not apply, where different sureties, under distinct obligations were interested. In the case of the United States, *vs.* Linn and others, 2d. McLean, 501, Judge McLean says: "The general doctrine as to the application of payments, is, that if the debtor fail to apply them, the government may do so. If both fail, the law will make the application, as the principles of justice shall require. Where different sets of sureties are concerned, this rule does not govern. Sureties on the bond of a Receiver of Public Moneys, are only bound, that he shall pay over all moneys received, after the execution of the bond. And the Government cannot bind them, for a previous defalcation, by the exercise of any supposed power, to direct the application of the judgments made.

[2] The student will find the principles upon which an account is to be taken, discussed at large, in Hoffman's Masters in Chancery.

thrown on him, to establish errors and mistakes. On such an order, the cause is referred to a master, before whom, the examination of the accounts, always takes place. The liberty to surcharge and falsify, includes an examination not only of errors of fact, but errors of law. To surcharge, is to supply an item which has been omitted, and to falsify, is to strike out or alter a charge which is wrong. A surcharge is appropriately applied to the balance of the whole account, and supposes credit to be omitted which ought to be allowed. A falsification applies to some item in the debits, and supposes the item wholly false, or partly erroneous. To constitute a stated account, it is not necessary that it should be signed by the parties. It is sufficient, if it has been examined and accepted by them, and this acceptance need not be express, but may be implied from circumstances, nor is it material that the account contains the clause, "errors excepted." Between merchants at home, an account which has been presented, and no objection made thereto, after the lapse of several posts, is treated under ordinary circumstances, as being by acquiescence, a stated account. Between merchants in different countries, a similar rule prevails. Acquiescence in a stated account, raises a presumption of its correctness, but by no means establishes the fact of its having been settled. A settled account is, where the balance struck and admitted by the parties, has been paid; and a *fortiori* may be pleaded in bar to a bill for an account.

6. After what lapse of time, will Courts of Equity refuse to entertain a bill for an account?

Where the demand is of a legal nature, they adopt the Statute of Limitations. If, however, the claim is purely equitable, or there is no bar by the Statute, they will not interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure, and the evidence may be lost. Nothing can call into activity, the powers of a Court of Chancery, but conscience, good faith, and reasonable diligence.[1]

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[1] McKnight *vs.* Taylor; 1 How. Unit. States Rep., 161.

7. Under what general divisions, may the most usual cases, involving matters of account, and therefore, furnishing the subjects of Equitable Jurisdiction, be considered?

They may be mostly embraced under the titles of Agency, Apportionment, Contribution, and General Average, Liens, Rents and Profits, and Waste.

8. When, and on what grounds, will a Court of Equity entertain a bill for an account, against agents?

Such a bill will lie against Attorneys, Factors, Consignees, Receivers, by one joint tenant, or tenant in common, or part owner, or partner, against another, and between guardian and ward, trustee and certui que trust. And the jurisdiction embraces, not only matters having their foundation in contract, but where a tort affecting property, has occurred in the course of an agency, from the fraud of the agent, the loss sustained, will be treated in Equity, as a debt against his estate. There are two principles connected with the law of agency, which show the convenience, if not the necessity, of resorting to Equity, for an account, in almost every instance. The first is, that it is the duty of an agent to keep regular accounts of all his transactions, with suitable vouchers. The second is, that agents are not only responsible for the property of their principals, but for all profits which they have clandestinely obtained, by an improper use of that property. Hence, it generally happens, from the confidence growing out of this relation, that a bill of discovery, which shall sift the conscience of the agent, and compel him to render a full account of all his transactions, is indispensable for the attainment of justice. And this is not only true, where there are mutual accounts, but even in cases where the account is confined to one side, and the agency limited to a single business.

9. What course will be pursued by Courts of Equity, towards an agent, who has neglected to keep regular accounts, or who has so intermixed his principal's property with his own, that they cannot be distinguished?[1]

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[1] The rule laid down that as against an agent who has mixed the property of his employer with his own, so as to render it undistinguishable, the whole may, both at law and in equity, be taken to be the prop-

They will, in the first case, deprive him of the compensation, which would otherwise belong to his agency; and in the second, treat the whole subject matter, as the property of the principal, until the agent satisfactorily distinguishes his own.

10. What is apportionment, and when will it be decreed in Equity ?

Apportionment is the ratable distribution of a claim or charge, among persons having different interests or shares, in the subject matter to which it attaches. It may be considered, first, as it regards personal contracts, and second, in reference to rents, charges or incumbrances.

First, as to personal contracts. These at Common Law are either entire or severable. Severable contracts are by their very terms, susceptible of apportionment; as, a contract to pay a person the worth of his services, so long as he will do certain work. In this class of cases, Courts of Common Law can grant ample relief. Entire contracts are those in which the entire fulfilment of the promise by one party, is a condition precedent to the fulfilment of any part of the promise by the other; as where there is a contract to pay a gross sum, for a certain and definite consideration. Here, no action can be maintained for the consideration, unless the whole contract is executed; although the performance be rendered impossible by unavoidable accident. Courts of Equity adopt the rules of law, in reference to entire contracts, unless some equitable circumstances intervene, to call for and justify their interposition, such as fraud, accident, or mistake. Thus, where an apprentice had

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erty of the employer, is well settled, but the same rule does not hold, in all cases, as against the creditors of the agent; for instance, if an agent pay money belonging to his employer into his own banking house, and to his own general account, this money may not be distinguishable; but should the agent become bankrupt, the whole sum which appears to be due to him from the bankers, will go to his assignees, and his employer can only come in as a general creditor under the commission; (15 Ves., 470.) So, if the bankers had any account with the agent, by way of set-off, that set-off would equally affect the money paid in to his account, (though in truth the money of his employer,) as it would the agent's own money, supposing the bankers to have no notice displacing their equity. (1 Jac. & Walker, 248.)

been discharged from service, in consequence of the misconduct of the master, the indentures of apprenticeship were decreed to be delivered up, and a part of the apprentice fee paid back.

Second, As to rents, charges and incumbrances. At Common Law, on the principle that an entire contract does not admit of apportionment, neither Courts of Law or Equity would apportion rent, as to time. Hence, when a lessor tenant for life died before the rent day, the rent was lost. This defect has been provided for in England, and it is presumed in all the States of the Union, by statute. And there have been some modern cases, in which Courts of Equity have decreed an apportionment, in consistency, as it would seem, with reason and justice. Although it is now settled, that at law a rent charge may be apportioned, in the case of descent, or judicial sales, or where the reversioner or owner of the rent, either releases a part thereof to the tenant, or conveys part of the land to a stranger, yet the difficulty of proceeding at Common Law, both from the number of the parties, and the necessity of an account, is such, that Courts of Equity have a general jurisdiction over the subject.

The most common and beneficial exercise of the powers of Equity, in decreeing an apportionment, is where an incumbrance or other charge on real estate, is required to be paid off, or is actually paid off by some of the parties in interest. In such cases the remedy at law is most imperfect, both from the difficulty of ascertaining the precise amount which each party is bound to pay, and the multiplicity of suits which would be necessary. Thus, where various persons have distinct interests in an estate, which has been mortgaged, as tenant for life, and remainder man; or where it has been sold in parcels to different purchasers;[1] it is obvious that the machinery of a

[1] The rule laid down in Harbert's case, 3d Coke's Rep. 12, 14, is quoted in the text of the Commentaries, viz: that where a man owning several acres of land, bound by a judgment, or recognizance operating as a lien, aliens one acre to A, and another to B, and a third to C; there if one alienee, to save his land, should be compelled to pay the entire charge, he will be entitled to contribution from the other alienees. Although this rule may be regarded as established in England, it by no

Court of Law is altogether inadequate to bring together all the parties in interest, or to institute the necessary inquiries. The leading rules which have been adopted by Courts of Equity on this subject, relate to the proportion which persons holding distinct interests should contribute to the discharge of an incumbrance, or to keeping down the interest, or to the proportion, which they should receive, of the purchase money, where an estate has been sold, without providing beforehand for the manner of apportionment. The rule which formerly prevailed in the first case, was this, that the tenant for life should pay one third, and the remainder man or reversioner, two thirds of the charge. This has been exploded, and a far more rational rule adopted. The tenant must contribute beyond the interest, in proportion to the benefit which he derives from the liquidation of the debt, and the consequent cessation of annual payments of interest, during his life. As this will depend upon his age, it will be referred to a master to compute the value of his life, and to report upon that basis the amount of the capital sum due, which ought to be borne by the tenant, and also by the remainder man, or reversioner. The general rule in the second case, is, that the tenant for life must keep down the interest, although he is not bound to discharge the principal. The rule in the last case is, that the value of the estate of each party, at the time of the sale, is to be ascertained, and the principal of the fund, apportioned between them, that of the tenant for life being calculated according to the common tables of the probabilities of life.[1] It is based upon the presumption, that the parties in a joint sale, do not mean merely to substitute one fund for another,

means prevails in the United States. The general principle laid down by Chancellor Kent, in his Commentaries, is, "That between purchasers in succession, at different times, of different parts of the estate of the judgment debtor, there is no contribution, for there is no equality of right between them." Vide., 4 Kent's Comm., 178, where numerous cases are cited. In the American Law Magazine, vol. 3, page 65, the same doctrine is elaborately defended. It is also laid down in 1 Freem., 427, and 2 Hill's Chy. Rep., 213.

[1] In 1 Story, C. C. Rep., 89, the reasoning upon which this rule is founded, and the authorities by which it is sustained, are cited at large.

but to share the purchase money according to their respective interests in the estate. This presumption cannot arise on a compulsory sale, and the rule is, there, after discharging the incumbrance, to give the income from the balance to the tenant for life, during the continuance of his estate: and then to pay over the whole capital to the remainder man, or reversioner.

11. What is the ground of Equitable Jurisdiction, in cases of General Average?

General Average means a general contribution, that is to be made by all parties in interest, towards a loss or expense that has been voluntarily sustained for their common benefit, and is applied to all expenses or sacrifices of property, voluntarily incurred during a maratime voyage, for the benefit of all the persons engaged in the adventure. From the number of distinct and adverse interests concerned, it is manifest that no case of General Average can be fairly adjusted in a Court of Common Law. The aid of a master to take an account, and adjust the apportionment at once, is indispensable to the purposes of justice, and accordingly, wherever a Court of Equity exists, it is usually resorted to for redress.

12. On what grounds, and in what cases, will Courts of Equity enforce a contribution?[1]

Courts of Equity follow the maxim, *Qui sentit commodum, sentire debet et onus*, and wherever there is an equitable obligation to share a burthen, independent of any contract, express or implied, they will not permit it to be thrown exclusively upon one party. This principle was applied by Chancellor Kent, to the case of an old party wall, which divided two estates, and was necessary to be rebuilt, and was rebuilt by the owner of one, who claimed contribution from the other, and had a decree in his favor. It lies between co-sureties, where one has been compelled to discharge the obligation, for which they were mutually bound; between legatees where there is a deficiency of assets, and previous to the ascertaining of all the debts, one legatee has received more than his proportion; between partners, where, upon the dissolution of the partnership, it appears

[1] Equity will not enforce a contribution among wrong doers. 2 Johns. Chy., 131; 1 Bibb, 562; 11 Ohio, 197; 1 Rand., 328.

that one has paid more than his share; between joint tenants, tenants in common, and part owners, where unequal expenditures have been borne for the common interest. The jurisdiction of Equity is founded upon its power of affording in almost every instance, a more complete relief than Courts of Law; as where an account and discovery are wanted, or where the number of parties in interest would occasion a multiplicity of suits; and upon the want, in many cases, of any other remedy whatever. Thus, where one surety dies, his estate is not responsible at law for contribution, or where one surety becomes insolvent, no larger amount can be recovered at law from his co-sureties, than that which they would have been responsible for, had all continued solvent.[1] But Equity will grant complete relief.

13. What principles have been established in Equity, as to the right of contribution among co-sureties?

First, The right does not exist, where, either expressly or by fair implication, it is inconsistent with the terms of the contract; as if different sureties are bound by different instruments, for distinct portions of the debt of the same principal.[2] Second, Equity will not permit the release of one surety, to discharge the remaining obligors, where it was not the intention of the creditor, but will still hold them bound for their full proportion of the original debt.[3] Third, that sureties will be entitled to the benefit of all securities which have been taken by any one of them, to indemnify himself against their common liability,

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[1] In 11 N. Hamp., 431, it was decided, that the removal of one of the co-signers of a note to another State, before its payment, was equivalent in effect to insolvency; and the party paying it, is not bound to seek his remedy against the co-signer in the foreign jurisdiction, but may recover by way of contribution, of each of those remaining in the State, an equal share of the whole sum paid.

[2] Contribution among co-sureties was originally founded upon the maxim, that "Equality is Equity;" and only applies to those whose situations are equal. Hence, if one surety stipulate for a separate indemnity, (as he has a right to do) the equality of situation between him and his co-surety ceases, and the maxim does not apply. 4 Hawks., 358; 1 Freem., 229.

[3] 11 N. Hamp., 368.

and also to all the collateral securities, both of a legal and equitable nature, which the creditor has taken as an additional pledge for his debt. Thus, where a surety discharges a debt, which is also secured by mortgage, he will be entitled to have an assignment of the mortgage, and to stand in the place of the mortgagee. Indeed, some of the cases have gone so far, (though with very questionable propriety) as to establish the principle, that the original securities had precisely the same rights as the creditor; and accordingly a judgment by the latter, against the bail of the principal, has been decreed, to be assigned for the benefit of the sureties, who had been compelled to pay the original bond. Fourth, that although a surety, who has paid off the debt of his principal, is entitled to have an assignment of any independent collateral securities, he cannot require from the creditor an assignment of the debt itself, and the instrument by which it is evidenced. The ground of this doctrine is, that the assignment of the debt itself, which had been already paid, would be a mere nullity in Equity, as well as at law. The principal might plead the payment in bar of any action against him, so that the instrument would not have in the hands of the surety any subsisting obligation. Upon the same principle, it is now held, that a surety who has discharged a bond debt, will be treated as a mere simple contract creditor, in the marshalling of assets. He is not subrogated to the rights of the creditor, on the specialty;[1] but is deemed to have paid money for the principal, upon the footing of an implied contract of indemnity. But a surety upon a second bond, which was given as a collateral security, has a right, upon its payment, to require from the creditor an assignment of the original bond, as an independent subsisting obligation for the debt.

14. What is a Lien, and when does it furnish a subject for equitable jurisdiction?

[1] This rule, although firmly established in England, does not prevail universally in the United States. The opposite doctrine is declared in 2 Call., 125, and 11 Leigh., 309. In the last case, sureties who had paid the bond debt of the principal after his death, were permitted to rank as specialty creditors. The same principle is affirmed in a case which went up from Virginia, 12 Wheaton, 594; 2 Brocken., 160; also, 1 Speer's Equity Rep., 534; 1 Desausure, 409.

A lien is simply a right to possess and retain property, until some charge attached to it, is paid. It exists by the force of contract, or of a statute, or of the usages of trade, as in the case of factors who have a general balance of accounts in their favor. It is sometimes the creature of a Court of Equity, which holds lands bound for the unpaid purchase money. The difficulty of recovering the property at law, where unless the precise amount is paid or tendered, no suit can be maintained, and the necessity of an account, are the foundations of equitable jurisdiction. Thus, where a lien exists on land, which has been sold to different purchasers, a resort to Equity may become indispensable, both to ascertain the amount of the incumbrance, which is due, and also, the fund primarily liable.

15. When will Equity decree an account of rents and profits?

Whenever the account is intricate and complicated, and, therefore, not easily adjusted at law, or when it is necessary to avoid multiplicity of suits. And this holds, not only where the matters of account grow out of privity of contract, as between landlord and tenant, but in many cases of adverse and conflicting claims. Thus, where a judgment creditor has extended land under an *elegit*, he is only bound to answer at law for the extended value. But Courts of Equity, treating the *elegit* as a mere security for the debt, will compel the tenant to account for the rents and profits which he has actually received. In the ordinary case of mesne profits, where there is no clear remedy at law, Courts of Equity will not interfere. There must be some equitable circumstances to draw into activity its remedial functions; such as fraud, or accident, or mistake, the want of a discovery, some impediment at law, the existence of a constructive trust, or the necessity of interposing to prevent multiplicity of suits. Thus, where a widow, whose claim for dower rests upon a legal title, cannot ascertain the land out of which she is dowable, and comes into Equity for discovery and relief, she may have an account of the rents and profits, after having established her title. So, where a plaintiff, who has recovered a judgment in ejectment, is prevented from enforcing it by an injunction, and the tenant dies before the suit is determined; there the remedy at law, by an action of trespass for the mesne

profits, is (or, rather, was,) gone. But Equity will entertain a bill for an account, against the personal representatives of the tenant; for it is inequitable, that a party who has unjustly suspended the operation of a judgment, should draw to his estate, by his own wrong, the benefit of another man's property.

16. In what cases of waste, will Courts of Equity decree an account?

There is some confusion among the authorities, but the general rule seems to be, that where a discovery is sought, or an injunction to stay future waste, there Equity will take jurisdiction. This is placing it upon the simple ground of avoiding a multiplicity of suits.[1]

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[1] "Wherever it appears from the nature of the transaction, that a plaintiff is entitled to an account, a Court of Equity will consider this a sufficient ground for an injunction, to restrain the defendant from proceeding at law, on a claim, the correctness of which cannot be ascertained till an account has been taken." Eden on Injunctions, page 51.

CHAPTER IX.

ADMINISTRATION.

1. GROUNDS OF EQUITABLE JURISDICTION IN THE ADMINISTRATION OF ASSETS.
2. WHAT IS A BILL OF CONFORMITY.
3. WHAT IS A CREDITOR'S BILL.
4. EQUITABLE ASSETS, AND ON WHAT PRINCIPLES ADMINISTERED.
5. DOCTRINE OF MARSHALLING ASSETS.
6. WHEN COURTS OF EQUITY WILL PURSUE ASSETS, MISAPPLIED BY AN EXECUTOR, INTO THE HANDS OF THIRD PERSONS.
7. PRINCIPLES AS TO ANCILLARY ADMINISTRATIONS.

1. On what grounds is the jurisdiction of Courts of Equity, in the administration of assets, founded?[1]

It may be referred to the existence of a constructive trust, on the part of the executors, or administrators, who are bound to

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[1] In 3rd John. Chy. Rep., 56, the Court raise the point, whether a creditor, in an ordinary case, and without some special cause, can come into Chancery, to collect his debt, from an executor, or administrator, or merely to enforce a ratable distribution of assets. This doubt, however, seems to be resolved in favor of the jurisdiction in the subsequent case of Thompson *vs.* Browne, 4 John. Chy. 619. And in 3rd Black. Rep. 295, the principle is affirmed, that Courts of Law and Equity, have concurrent jurisdiction, as to suits against heirs, executors, or administrators, for the debts of the decedent; vide also 5th Black, 508.

make a proper disposition of the property which comes into their hands; and also to the necessity of taking accounts, and compelling a discovery, and the consideration that even where a remedy exists at law, it is not plain and adequate. Besides, only legal assets can be reached at law, and the whole doctrine of marshalling assets, which is often the only means of securing the claim, is exclusively administered in Equity.

2. What is a Bill of Conformity?

It is a bill filed by an executor or administrator against the creditors generally, for the purpose of having their accounts adjusted, and the assets distributed, under the discretion of the Court. These applications are not ordinarily favored, because they delay all the creditors in the collection of their debts, and put the diligent on a level with the dilatory. And that the executor or administrator may not have it in his power to retard the settlement of the estate, unreasonably, Equity will not enjoin any creditor from proceeding at law, until a decree has been rendered against the executor or administrator to account.

3. What is a Creditor's Bill?[1]

Any creditor may file a bill, for the payment of his own debt, seeking a discovery of assets; and in a suitable case the Court will direct an account of the personal estate, and of that particular debt, and order it to be paid in the due course of administration.[2] But the more usual course is for one or more creditors, to

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[1] A bill may be also filed in analogy to a creditor's bill, by one legatee, in behalf of himself, and other legatees, or by one person claiming under a general description, such as that of next of kin, for himself, and others equally entitled. But in such a case, unless the personal representative by admitting assets for the payment of the legacy, warrants an immediate personal decree against himself, the Court will direct a general account of all the legacies, of the same testator, and payment of the legacy claimed, ratably only with the other legacies, no preferences being allowed among legatees in the administration of assets. Vide Williams on Executors, 124, vol. 2.

[2] In 5 John. C. Rep. 619, the rule is laid down, that on a bill filed by one creditor, for himself alone, the decree for an account, will be for the benefit of all the creditors, and in the nature of a judgment for all. All may come in and prove their demands; and from the date of such decree, the court will enjoin creditors from proceeding at law, and will take

file a bill, on behalf of the creditors generally, who may come in under the decree, for an account of the assets, and a due settlement of the estate. The effect of such a bill is to secure an equal distribution of the assets, and carry out the favorite maxim, that equality is equity: for no preference of one or more creditors can be given, after a decree has been rendered for their common benefit.[1] To prevent collusion, no creditor will be enjoined from proceeding at law, before a decree has been rendered against the executor or administrator, and not then, unless the latter shall in his answer, state the amount of the assets, and offer to bring them into court, or to obey its orders in the premises. The usual decree on these bills against the personal representative, is *quod computet;* that is, the Master is directed after giving due notice of the time and place to the creditors, to take the accounts between them and the deceased; and also, to take an account of the personal estate in the hands of the executor or administrator; and to apply the same in a due course of administration to the payment of debts and charges. On this proceeding each creditor is entitled to appear before the Master, and contest the claim of any other creditor, as if it were an adversary suit.

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the sole distribution of the assets. The power of the Court to make so general a decree, in such case, is also laid down by Judge Story, in a note to his Commentaries. Mr. Hoffman, in his treatise on the Office of Masters in Chancery, has critically reviewed the authorities bearing on the point, and arrived at a different conclusion. "The doctrine of the Court," he says, "is, that a bill of this description is like an action at law for a creditor for his own benefit, and on his sole account, under which, other creditors have no right to come in; that on such a bill, the decree *quod computet*, amounts to no more than an interlocutory judgment at law, and gives no preference; that the decree must be final, for the recovery of a liquidated sum, before it becomes equivalent to a judgment; and that, therefore, until such a decree, the Court will not interfere with another creditor proceeding at law."

[1] An executor or administrator, pending a suit in Equity, and prior to a decree, may confess a judgment at law, so as to give one creditor the preference. If the creditor, (which is admitted,) has a right to sue at law, the administrator must equally have a right to waive the expense and folly of a litigation, and confess the debt. 7th Johns. Chy. Rep. 206.

4. What are equitable assets, and upon what principles are they administered?

That portion of the estate of a deceased person, which comes into the hands of his personal representative, *virtute officii*, and is directly liable for the payment of debts and legacies, is termed legal assets, and must be distributed among creditors, according to certain rules of priority, prescribed by law. That portion of the estate, which is only chargeable with the payment of debts and legacies in Equity, and which must be reached through its aid, is called equitable assets.[1] Thus, land charged by a testator with the payment of debts generally, is considered as equitable assets.[2] But an equitable estate may be declared to be legal as-

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[1] It is a question which has undergone much discussion, whether an equity of redemption constitutes legal or equitable assets. Judge Tucker, in his Commentaries, Vol. 1, page 418, examines it, at some length, and concludes that it is, in almost every instance, legal assets. Of course, such is its character, where, (as in most of the States,) it is vendible as real property, on an execution at law.

[2] There is an increasing disposition, among the authorities, to lean towards that construction, which shall raise a charge for the payment of debts, that a man may not, as it were, sin in his grave. A general direction by will, for the payment of debts, will overrule every other disposition, which a testator may make of his real estate. But real estate is not charged with the payment of legacies, unless such an intention on the part of the testator, is either expressly declared by, or may be fairly inferred from, the will; 2 Johns. Chy. Rep., 614, 624. The distinction proceeds upon the ground of a moral duty in the one case, which does not exist in the other; vide 1st Vesey 436, and 2 Ves. 328, Sumner's edition. The authorities are cited at large in the notes of the editor. It should be noted, however, that when land is devised or charged with the payment of debts, it will be considered as equitable assets, and distributed pro rata, among all the creditors, without giving any preference to a specialty creditor, who, independent of the charge, might have looked to the land for satisfaction. The reason of this rule is, that prior to the statute of fraudulent devises, the claim of the specialty creditor was defeated by a devise; and that statute, after declaring devises void, so far as they affected creditors, expressly excepted such as were, for the payment of debts. These, therefore, continue as before, and constitute equitable assets; vide 1 Vesey, Jr., 11, note 3, Sumner's edition; 2d Brown, 94, American edition; 1 Tucker's Com. 417.

sets by statute. In England, trust estates belong to this class. In the administration of legal assets, Courts of Equity give the same priority to different classes of creditors, which they enjoy at law; but equitable assets are distributed among all creditors equally, in proportion to the amount of their debts. Creditors are however, to be paid in preference to legatees, on the natural ground, that a man must be just, before he is generous. But the rule of equality prevails among legatees, who resort to an equitable fund, for satisfaction of their claims. When the assets are partly legal, and partly equitable, Courts of Equity will not deprive any creditor of his legal priorities; but, if after having by that means, extinguished a portion of his debt, he resort to the equitable fund, he will be postponed, until the other creditors who have no remedy at law, have received an equal amount of their claims from the equitable assets. It should be observed that both in reference to legal and equitable assets, Courts of Equity respect all antecedent liens or charges, upon the property, whether of a legal or equitable nature.

5. What is meant by the marshalling of assets, and when will it be done?[1]

It is a rule of justice and morality, extensively applied in Courts of Equity, that one man shall not capriciously exercise his rights, to the prejudice of another. It is the foundation of

[1] Very few of the subtle distinctions of the English law, on this subject, are applicable in our own country. The general policy of the law with us, is to make the whole of a man's property liable for the payment of debts, both during his life, and after his death. In a country, where almost all feudal distinctions have become obsolete, there is no foundation for any difference. All debts too, are generally placed upon an equal footing. The cases in New York and Virginia, in which this doctrine has been discussed, are more numerous and learned, than can be found in any other American Reports, for the reason, probably, that, until a recent period, more vestiges of the English law, have remained on their statute books, than elsewhere. It may be well to add, however, that Courts of Equity will not compel a creditor who has two funds, to resort to that which is most tedious or embarrassing. Thus they will not permit a simple contract creditor to enjoin a mortgage or specialty creditor, from pursuing the personal estate, by plain action of debt, and compel him to resort to the embarrassing proceedings of an action of debt against the heir, or a tedious bill to foreclose the mortgage. 2 Fonb. 302; 1 Tucker's Com. 422; 1 Freem. R. 574.

the jurisdiction, in marshalling assets and securities, whereby a person having an interest in two funds, the property of one man, will be restrained from proceeding against that which is alone liable to the claims of another. This beneficent equity will be administered in favor of creditors, legatees, devisees, an heir, a widow, or any other person, morally entitled to its application. Thus, where a mortgagee, a vendor of land, who has a lien on it for the unpaid purchase money, or a specialty creditor who may resort to either of two funds, are satisfied out the personalty, a simple contract creditor will be substituted to their rights against the realty.[1] For example, land in the possession of a devisee, may be made liable, to the debts of a simple contract creditor, where a specialty creditor has exhausted the personal estate. So, Courts of Equity will marshall the assets in favor of a widow, whose paraphernalia have been taken by creditors, for their debts. And where an heir or devisee has paid a bond debt of the deceased, they will be substituted to the rights of the creditor, against the personal estate, even to the exclusion of residuary legatees, or distributees. This doctrine results from the peculiar character in legal contemplation of the personal estate, which both at law, and in equity, is regarded as the natural and primary fund for the payment of debts. Therefore, it does not prevail in these two cases: First, where the testator has expressly, or by manifest implication, exempted the

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[1] In 1 Brock. 266, Judge Marshall, after reviewing the English cases, decides "that simple contract creditors, will be substituted for specialty creditors, but not for judgment creditors; that is, the simple contract creditors cannot charge the lands for so much of the personal fund as has been applied to the payment of debts due by judgments, obtained against the ancestor. The reason is, that the writ of elegit, by virtue of which, the land is charged by judgments against the ancestor, does not issue singly against the land, but against all the *chattels*, (save oxen, and beasts of the plough,) and if the chattels be sufficient, the land ought not to be extended. The judgment creditor, therefore, has not the election between two funds, (as the specialty creditor has,) and the principle on which assets are marshalled, does not apply to the case." The student will not be able to find this obscure point, so fully and ably considered in any English case, as in the opinion of Judge Marshall, from which we have quoted.

personal assets from their burthen; as where the personalty is bequeathed, and the real estate directed to be sold for the payment of debts and legacies. Second, where the land is primarily charged with the claim, and the personal estate is only collateral security; as where a portion is directed to be raised out of lands, by the execution of a power.

Where a mortgagee or specialty creditor has exhausted the personal estate, the legatees may marshal the real assets descended to the heir; but not an incumbered real estate which has been devised. The reason of the difference is, that in the last case the testator has manifested an intention of being equally bountiful to both parties, and therefore the Court can draw no distinction. Where lands have been charged with the payment of debts, generally, and a simple contract creditor, has excluded the legacies, by exhausting the personal estate, they will be thrown *pro tanto* upon the realty. Assets are generally marshalled in the following order, for the payment of debts: First, the general personal estate, unless exempted, expressly or by plain implication. Secondly, any estate particularly devised for the payment of debts, and only for that purpose. Thirdly, estates descended to the heir. Fourthly, estates specifically devised to particular devisees, although they may be charged with the payment of debts.

6. When will Courts of Equity follow assets, which have been misapplied by an executor, into the hands of third persons?

In Courts of Equity, assets are treated as a trust fund, to be administered by the executor for the benefit of all persons interested in them, and wherever third persons have fraudulently colluded with an executor in their misapplication, they may be reached in the hands of such persons. And this is *prima facie* the case, where a party receives for his private debt, the assets of the estate. Unless some such circumstance be shown, the transaction will be presumed to have been innocent and fair, inasmuch as an executor is clothed with a general power of disposition over the assets.

7. What principles are applicable to ancillary administrations?

An ancillary administration is one taken out where the assets are locally situate, and is subordinate to the original administra-

tion.[1] In regard to creditors, the established rule is, that the assets are to be administered according to the laws of the country where they are situate, and from which the personal representative derives his authority. But the claims of legatees, and distributees, are to be determined by the law of the domicil. No fixed rule of disposition has been established, where after paying all debts and other claims due, in the country of the ancillary administration, a balance remains on hand. It seems to be a matter of judicial discretion, depending upon the circumstances of the particular case, whether the Court will remit such property to the forum of the domicil of the deceased, or whether, it will finally distribute it among all persons having rights or equities in the funds, whatever be their domicil, and in such case, upon what principles.[2] Where the domestic administra-

[1] It was adjudged in 7th Paige, 239, that the Court of Chancery has jurisdiction to compel a foreign executor or administrator, to account for the trust fund, which he received abroad, and brought with him into the State, although he has taken out no new letters. A similar principle was affirmed in 11th Leigh, 1; and it was held, that the assets should be applied according to the law of the State, from whence the administrator derives his authority.

[2] In the case of an insolvent estate, are the assets to be sequestered, for the benefit of the creditors, resident in the country of the ancillary administration, or are they to be distributed *pro rata*, among the foreign and domestic creditors, and if so, by what Court? These questions were considered in Massachusetts, 3 Pick. Rep. 128, and Pennsylvania, 3 Penn., 185. It was held in the last case, that the intestate's effects were to be collected and administered under the authority of the local jurisdiction in which they were, at the time of his death, and with the permission to foreign creditors to participate in proportion to their debts, respect being had to the aggregate of the estate, and the debts, whether foreign or domestic. This subject has been examined with great ability, in a late case, in New Hampshire, and as it is one of general interest, we spread a part of the reasoning of the Court, before the student:

"Shall the government which administers the property within its jurisdiction, and causes that administration to enure for the benefit of its own citizens, exclude the citizens of other States from a participation in it, by refusing to entertain their claims? The first answer to this question may be drawn from a consideration of the state of the law relating to the remedies of the creditors, preceding the death of their debtor. It would not, perhaps, be too much to say, that there is no na-

tor has also taken out letters abroad, he cannot be called upon, before the foreign administration is settled, for an account of assets received there, by the domestic creditor. Where separate

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tion, possessing just claims to be regarded as a civilized government, in which, during a time of peace and friendly relations, the subjects or citizens of a foreign State are excluded from pursuing similar remedies for the collection of debts, to those provided for its own subjects. It is sufficient that no such exclusion is known to the common law, nor to the statutes of England, or those of the several United States. So far as regards the relations of the latter to each other, any attempt at such exclusion, is prohibited by the clause of the Constitution of the United States, which provides that the citizens of each State, shall be entitled to the privileges and immunities of citizens in the several States. If the creditors of the domicil may pursue the property of the debtor, in his life time, in another government, equally with the citizens of the government where the property is situated, no sound reason suggests itself, why they should be debarred of a remedy, and the property be appropriated exclusively, or in the first place, to the satisfaction of the creditors in the latter government, on his decease. Even, if by permitting them to come in, the property may be insufficient to pay all, and the creditors in the government where the property is situated, be thereby compelled to resort to the principal administration, where the debtor had his domicil, or to lose their debts, or a portion of them; this result is no other than might have been attained, in the life time of the debtor, by his withdrawal of the property from their jurisdiction.

"Another answer, and one which seems entitled to weight, is furnished by the considerations to which we have before adverted, showing that the ancillary administration, so far as creditors are concerned, is to be governed by the lex loci. If no regard is had to the place of residence of the deceased, in the marshalling of the assets, and the payment of the debts, no good reason occurs to us, why any regard should be had, to the place of residence of the creditors, in the allowance of the claims. And, besides, it is not quite clear, in cases of actual insolvency, where there is sufficient personal property in the hands of the ancillary administrator, to pay the debts due there, that the other creditors can reach the real estate, if any, in that place, except by presenting their claims there, and having them allowed, in due course, on a representation of insolvency. By the laws of this State, lands are charged with the payment of debts, and an execution issuing against the goods and estate of a person deceased, in the hands of his executor, or administrator, may be extended upon lands which were of the deceased. 2 N. H. R., 341. And the administrator may sell the lands, under a license, for the payment of debts, if they are necessary for that purpose, whether the estate

administrations are granted in different countries, they are so far independent, that property received under one, cannot be sued for under another, although for the time it is locally situate within its jurisdiction.

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be solvent or insolvent. But if there is sufficient personal estate here to pay all the demands against the estate, which may be prosecuted or allowed here, it may admit of question, whether license can be granted, on a representation that the estate is insolvent, under the administration of the place of the domicil. If the ancillary administrator has sold real estate, he may be required to pay over the balance of any proceeds remaining in his hands, to the principal administrator, or to account for such balance himself, in the settlement of his account, in the place of the domicil, if he happens to be administrator there also. 6 V. R. 374; 7 N. H. R., 496; 10 Pick., 78. And furthermore, the creditors where the ancillary administration exists, are not bound to present or prove their claims in that place, but may rely upon their remedy in the place of the domicil alone, if they so elect.

"For these reasons, we are of opinion, that where a person, domiciled in another government, dies, leaving property in this State and an ancillary administration is taken here, and the estate represented insolvent, all the creditors of the deceased are entitled to prove their claims against the estate here, and to have it appropriated in satisfaction of their demands." 11 N. H. Rep., 98.

CHAPTER X.

LEGACIES.

1. GROUNDS OF EQUITABLE JURISDICTION OVER LEGACIES.
2. WHEN THE EXECUTOR WILL BE CONSIDERED AS A TRUSTEE FOR THE NEXT OF KIN.
3. PROTECTIVE JURISDICTION OF EQUITY IN CASES OF LEGACIES.
4. DOCTRINE OF EQUITY AS TO A DONATIO CAUSA MORTIS.
5. MAY A DONATIO CAUSA MORTIS BE THE SUBJECT OF A TRUST.

1. On what ground do Courts of Equity entertain suits for legacies?[1]

No action can be maintained at law, even for a specific legacy, unless the executor assent thereto; and even in the case of his assent, it will not lie, according to the better opinion, for a pecuniary legacy. Such a jurisdiction would be productive of mischief; for a Court of Law can impose no terms upon the parties, however proper it may be. The jurisdiction of Equity is universal, and is founded upon these principles: first, the want in many cases of any remedy at law; second, the inability of a Court of Law to compel a discovery, take an account, marshal

[1] The acceptance of a devise of land, charged with the payment of a legacy, creates a personal liability for its payment on the part of the devisee. Such a devisee cannot require of the legatee before payment a security to refund, in case of a deficiency of assets to pay debts. 6 Johns. Chy., 33, 37; 6 Watts, 167.

the assets, or impose terms upon the parties, without the exercise of which remedial functions, there would be a failure of justice; and, lastly, the existence of a constructive trust, which attaches to the executor for the benefit of the legatees. Wherever legacies involve the execution of trusts, express or implied, the jurisdiction is exclusively vested in Equity.

2. Where the testator has not disposed of the surplus of his personal estate, will the executor take it in Equity ?[1]

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[1] The law relating to legacies is incidentally treated throughout the volume. It seems appropriate here, to notice some important principles, especially connected with the different incidents of general and specific legacies, that are not considered elsewhere.

1. The inclination of the Courts is to construe a legacy to be general, rather than specific. 4 Vesey, 555; 8 Vesey, 410. This principle is carried so far, that if there is the least opening to imagine the testator meant to give a sum of money, and referred to a particular fund *only*, as that out of which he meant it to be paid, it will be construed pecuniary; but if the words clearly indicate an intention to separate the particular thing bequeathed from the general property of the testator, they shall have that operation. Hence, under some circumstances, even money legacies have been held to be specific, as of a sum of money in a certain bag. So, a bequest of all the testator's interest in thirty shares in the Bank of the United States, has been held to be a specific legacy. 7 Johns. Chy. R., 262; 3 Desaus, 384. Whether a bequest is to be adjudged a specific disposition of an identical debt, or the debt is to be considered merely as the fund out of which it is to be first satisfied, and the legacy to be paid at all events, although such fund fail, is a question resolving itself into the testator's intention. It has been declared to be a rule of construction applicable to such cases, that where the gift of the legacy is so connected with the debt as security, as that the gift of the legacy and of the debtor security are the same, the intention to give nothing more than the identical debt or money due on the security is apparent, and consequently the legacy will be specific. A legacy of a debt, unless there is ground for considering it a legacy of money, and that the security is referred to, as the best mode of paying it out of the assets, is as much specific as the legacy of a horse, or any moveable chattel, whatever. 22 Pick., 299, 302; 20 Maine, 107; 8 Dana, 69; 4 Brown C. C., (Am. edition) 349, 350.

In 6 Pickering, 48, it was held, that where a testator bequeathed a certain amount of stock in a particular bank, he being the owner at the time of his making his will, of the exact amount of stock bequeathed,

He is considered a mere trustee of such surplus, for the benefit of the next of kin, if a presumption arises from the nature and circumstances of the will, that the testator did not intend that he should take it for his own use. Parol evidence is inadmissible to show such an intention. It must be gathered from the will.

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the bequest was to be taken as a specific legacy, and that a sale of it before his death, was an ademption. But contra, in 1 Ired. Eq., 45.

Although, however, on this favorite principle of construction, the Court will deem a legacy, having reference to a particular fund for a payment in the first instance, a pecuniary legacy, in order that it may not be defeated by the destruction of the security; yet it is so far treated as a specific legacy, that in case of a deficiency of assets, it is not bound to contribute out of the specific fund, which is its *peculium;* whilst on the other hand, if the particular fund fails, it may come upon the general assets for payment. 3 Desaus, 386; 3 Ves. and B., 5. And this disposition of the authorities arises out of the well established distinction, that where a debt or specific chattel is bequeathed, the legacy will be extinguished by the payment of the debt, or the conversion of the chattel in the lifetime of the testator; but if the fund pointed out by the will to satisfy a general legacy fails, the legacy itself is to be made good out of the general assets.

2. Where there is a deficiency of assets, all the *general* legacies must abate proportionally, in order to pay the debts; but a specific legacy is not abated until the general legacies have been exhausted. But legacies founded upon a valuable consideration, such as a previous indebtedness, or in lieu of dower, whether general or specific, do not abate ratably with other legacies. 6 Paige, 278; 1 Desaus, 500; 1 Edw., 411.

3. As a general rule, founded rather on convenience than strict principle, legacies are held not to be due (without special declaration of the testator's intent to the contrary,) until the end of the year after the testator's decease. Where legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due upon the securities is got in; but though there are many cases in which no diligence could actually reduce the property into possession, by the end of a year from the testator's death; yet Courts of Equity, upon the strength of the rule which we have laid down, charge the executor with a constructive receipt, for the purpose of giving the legatees interest. A general pecuniary legacy does not bear interest before that time, unless it be in satisfaction of a debt, or the testator be a parent, or stand in *loco parentis* to the legatee, in which case, and also, it seems, in that of a residuary legatee for life, interest is to be

3. What protective jurisdiction will be exercised by Courts of Equity, in the case of legacies?

Where pecuniary legacies, whether contingent or not, are payable at a future day, Courts of Equity will compel the executor to give security for their payment; or to bring the fund into Court, even where there has been no actual waste, or danger of it. Where a specific legacy is given to one for life, and after his death to another, there the remainder man cannot require security for the delivery of the property, without alleging and proving waste, or danger of waste.[1] But he may have an in-

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computed from the period of the testator's death. 7 Ves., 98; 6 Ves., 520; 1 Ves., 310; 2 Johns. Chy. Rep., 214. So, it has been held both by English and American authorities, that a legacy, charged on real estate, yielding rents and profits, should bear interest from the testator's death. 9 Vesey, 483; 6 Johns. Chy. Rep., 33. But Mr. Preston, in his work on Legacies, considers this doctrine as shaken, if not overruled, by the late authorities. A specific legacy is, however, an immediate gift of the fund, and is an exception to the general rule, that a legacy, does not carry interest until the end of the year after the testator's decease.

4. It is a rule of construction, that a testator is never supposed to mean to give to any, but to those who shall survive him. A legacy is, therefore, lapsed or extinguished, when the legatee dies before the testator, or before the condition upon which the legacy is given has been performed, or before the time at which it is directed to vest in interest, shall arrive. A testator may prevent a legacy from lapsing, but it must be done in express terms. It is not sufficient that a legacy is given to a man, his executors, administrators, or assigns. These words are taken as mere surplusage. 7 Paige, 421; 1 Iredell's Equ., 31; 6 Dana, 52; 4 Vesey, 418. There is a distinction recognised in England, and in some of the American States, between a lapsed devise of real estate and a lapsed legacy of personal estate; the former descending to the heir at law, and the latter falling into the residuary estate, and suffering the same disposition. 10 Vesey, 500; 1 Dana Rep., 207; 4 Paige, 115.

It is laid down in 9 Paige, 160, that where an estate for life, or an interest short of absolute ownership, is given in the general residue of the testator's personal property, terms for years, and other perishable funds or property, which may be consumed in the using, must be converted or invested in such a way as to produce a permanent capital; the interest or income of which capital alone belongs to the owner of the particular estate in such general residue. But in the case of a bequest

ventory, for the purpose of identifying it, and when his right accrues, of enforcing the delivery.

4. What is the doctrine of Equity, as to a *donatio causa mortis?*

It is a gift of personal property, by a party who is at the time in peril of death, upon condition that it shall belong to the donee in case of the donor's death. It differs from a legacy in two particulars. First, it is in no sense a testamentary act, but takes effect by delivery from the donor to the donee, in his life time. Second, and this is a consequence of the first, it requires no assent on the part of the executor or administrator to perfect the title. It differs from a gift *inter vivos* in several particulars, in which it resembles a legacy. First, it is ambulatory and revocable during the life time of the donor. Second, it may be made to the wife of the donee. Third, it is liable to the debts of the donor, upon a deficiency of assets. Nothing can be the subject of a *donatio causa mortis* which is incapable of passing by delivery. It is not meant by this, that a complete property in the thing must pass by the delivery; but it must so far pass, as to create a trust in favor of the donee, which a Court of Equity will enforce. Thus, a mere chose in action, not subsisting in any specific instrument, cannot be the subject of a *donatio causa mortis.* But bank notes, negotiable notes payable to bearer or endorsed in blank, bonds and mortgages may, because they either pass by delivery, or being securities for debt, entitle the holder to the assistance of Equity in reducing them into possession. So, a delivery by the mortgagee of the bond and mortgage to the mortgagor, will operate as a discharge of the debt. In Maryland, the Courts of Appeals

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of specific chattels to A, for life, with remainder over, the legatee for life is entitled to the possession and enjoyment of the chattel, and not to have it sold by the executors, and the proceeds invested for his use, unless the will directs it. He is entitled to the increase and income of it from the testator's death. If, however, the property bequeathed would be of no use unless converted into cash, in that case a safe investment ought to be made by the executor, for the benefit of the parties in interest respectively. 6 Gill. and Johnson, 171; 8 Paige, 295. The English authorities on the subject of this note, are somewhat fluctuating and uncertain. They are cited at large in 2 Beavan, 512, 17 vol. of the American edition of the English Chancery Reports.

have in several cases laid down the doctrine, that to constitute a good *donatio causa mortis*, the gift should be full and complete at the time, passing from the donor the legal power and dominion over the thing intended to be given, and leaving nothing to be done to perfect it. But this principle may now be regarded as overruled by the weight of both English and American authority.[1]

5. May a *donatio causa mortis* be the subject of a trust?

The point has not been expressly adjudicated, but the inclination of the Courts is very manifest to sustain such a donation; and this is in analogy with the principles of the civil law.[2]

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[1] The following points of interest have been adjudicated in our own country, on this subject:

1. A *donatio causa mortis* will be good, where the subject is delivered to a third person, for the use of the donee. 3 Binney, 370; 15 Maine, 429; 1 Paige, 316; 5 Blackford, 179; contra, 10 Mass., 427.

2. In 1 Cowen R., 598, the Supreme Court of New York held that a promissory note of the donor himself, executed in his last illness, and delivered by the maker to the donee, (the payee) in contemplation of death, was a good *donatio causa mortis*, although no consideration passed. But in 14 Pickering, 207, the contrary doctrine is affirmed, so far as it applies to the donor's *own* promissory note, payable to the donee, which it is said cannot be the subject of a *donatio causa mortis*. But the promissory note of a *third* person may be the subject of a *donatio causa mortis*.

3. In 2 Wharton, 17, it was held not to be indispensable to a valid *donatio mortis causa*, that it should be made in *extremis*, like a *nuncupative* will. The Ch. J. defined it to be a conditional gift, depending on the contingency of expected death, and that it was defeasible by revocation or deliverance from the peril. To constitute a *donatio causa mortis*, the circumstances must be such as to show that the donor intended the gift to take effect if he should die shortly afterwards; but that if he should recover, the thing should be restored to him.

[2] It was held in 8 Meeson and Welby, 401, that a gift may be good as a *donatio causa mortis*, although coupled with a trust, that the donee shall provide for the funeral of the donor; and in 21 Maine, 185, that a *donatio mortis causa* is good, although a chose in action, accompanied by a mortgage as collateral security therefor; and notwithstanding it were in trust, for the benefit of others besides the donee.

CHAPTER XI.

CONFUSION OF BOUNDARIES.

1. WHEN EQUITY WILL ENTERTAIN A BILL TO ASCERTAIN THE BOUNDARIES OF LAND.

1. When will Courts of Equity entertain a bill to ascertain the boundaries of land?

The jurisdiction of Equity, in cases arising out of the confusion of boundaries, is very ancient, but its sources are at best, conjectural. It most probably originated, in the consent of the parties, and was extended, by easy transition, to cases which stood upon equitable grounds. The Courts are very adverse, at present, to its extension. The existence of a controverted boundary, will not, by itself, be sufficient, to induce the Court to entertain a bill for relief: for, the ordinary legal remedies may be adequate. Some equitable consideration must supervene, or the Court of Chancery has no jurisdiction to settle the boundaries of legal estates. This occurs; First, where the confusion has been created by fraud. Second, Where the confusion has arisen from the negligence or misconduct of a party, bound to preserve and protect the boundaries. In this case, it is indispensable to aver and establish by proof, that the boundaries cannot be found without such assistance.[1] Third, when a bill in Equi-

[1] In the case of Stuart's Heirs, *vs.* Coalter, 4 Rand. 87, Judge Green, in delivering his opinion, used language somewhat inconsistent with the

ty will prevent a multiplicity of suits, as if a right of common in lands, claimed by a number of persons, has become intricate, and entangled, from confusion of boundaries. Fourth, where, without the aid of Equity, irreparable mischief would ensue; as when rent is chargeable on lands, and the remedy by distress, has been lost by confusion of boundaries. Courts of Equity ascertain the boundaries by a commission appointed for the purpose, and if that is impracticable, they will do justice by assigning reasonable boundaries, or setting out lands of equal value.[1]

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statement of the text. He says, that where the tenant holds adjoining lands of his own, and fraudulently or carelessly, confounds or destroys the evidence of his landlord's boundaries, then, the latter may sue the tenant in Equity; not for the purpose of establishing his boundary, but for having a decree that the tenant shall transfer to him, so much of his land, as will make up the original quantity, belonging to the landlord. In such case, if the actual boundary was proved by the tenant, the suit would fail.

[1] A Court of Equity has no jurisdiction to settle the title or bounds of lands, between adverse claimants, unless the plaintiff has an equity against the defendant claiming adversely to him. An equity against other persons, will not give such jurisdiction. 4 Rand. 87.

CHAPTER XII.

DOWER.

1. JURISDICTION OF EQUITY IN CASES OF DOWER.
2. WHEN WILL IT GRANT RELIEF AGAINST A PURCHASER WITHOUT NOTICE FOR A VALUABLE CONSIDERATION.

1. When will Courts of Equity entertain a bill for the assignment of dower ?[1]

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[1] Two points, not considered in the text, may be appropriately added in this connection.

1. In England, a widow is not dowable in her husband's equity of redemption, but in most of the States of our Union, a contrary rule prevails. In several of them, the statute law expressly gives the widow her dower, in the equitable estates of which her husband died seized, even in all trust estates, in which he took a beneficial interest. But, in Maryland, and in the Maryland part of the District of Columbia, the common law rule prevails, and a widow is not dowable in her husband's equity of redemption. 4th Kent's Com. 44, 45.

2. There are several American cases, in which the question, whether the widow of a partner, is entitled to dower in real estate, held by the partnership, is discussed with great learning. Chancellor Kent refers with particular commendation, to the case of Greene *vs.* Greene et al, 1st Ohio Rep. 535, where it was held, that the widow of a deceased partner is not entitled to dower in lands, purchased and paid for, out of the partnership funds, under articles stipulating for the sale of the whole partnership property, for the payment of debts, and used exclusively in carrying on their trade, the partnership being insolvent, and the deceas-

Courts of Equity entertain a general concurrent jurisdiction with Courts of Law, in the assignment of dower, in consequence of the difficulties which in almost every instance, embarrass the legal proceeding.[1] An almost universal ground of jurisdiction is found, in the necessity of resorting to Equity, either to obtain a discovery of the title deeds, or of the dowable lands, or to obtain an account of the mesne profits, or to remove an impediment to a recovery at law. There are many other cases, in which the aid of Equity is indispensable, as where the husband is tenant in common of the lands dowable, or where they have passed into the hands of various purchasers, and their relative value is not easily ascertainable. Courts of Equity will not only assign dower, but decree an account of the rents and profits,

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ed partner very greatly indebted to the firm. This case proceeded on the general principle, that lands agreed to be turned into money, or money into lands, shall be considered in equity, as that species of property, into which they are directed to be converted. So, in 8 Ohio, 364; where partners manifest an intention to hold land, as partnership stock, and buy and sell it as such, dower cannot be claimed in such lands, to the prejudice of partnership creditors. But there is no decision in that State, which declares, that as against the heir, or the general creditors of the husband, the widow is not entitled to dower in land, held as partnership property. This subject was very elaborately considered, in the cases of Dyer *vs.* Clark, and Howard *vs.* Priest, 5 Metcalfe, 562, 582; and the Court held, that when real estate is purchased by partners, with the partnership funds, for partnership use and convenience, in the absence of any express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, the widows of the partners are not entitled to dower in the estate, nor are the heirs of the partners entitled to the accruing rents and profits, until the partnership accounts are settled and the partnership debts paid. Vide also, 2d Desaus. 471; 7 Conn. 11; 9 Dana, 410. In 3rd V. E. Howard, 361, it was decided, that when lands were purchased by partners, in the absence of any agreement that they should be considered as joint stock, or any application of them, evincing such an original understanding, the wife of a deceased partner, is entitled to dower; vide also, 7th How., 437. The same principle is affirmed, in 2d Edw. Rep. 28, and 6th Yerger, 20.

[1] If the title to dower be of an equitable nature, the widow must resort to equity for relief. 3rd Blackford, 12.

in a case where the widow could recover damages at law.[1] If the right to dower is disputed, the jurisdiction will not attach until it has been established by an issue at law, or otherwise.[2]

2. Will a bill for discovery and relief, be entertained against a bona fide purchaser for a valuable consideration, without notice?

The doctrine on this subject is somewhat unsettled; but the weight and reason of authority seem to be in favor of the jurisdiction, where relief is claimed upon the strength of a legal title. In this case, Equity merely enforces a right, which the defendant cannot resist at law, by such a defence. But where the widow seeks equitable relief, such as the removal of terms out of her way, or, for a discovery, the plea of a purchase without notice, for a valuable consideration, is a complete bar.[3]

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[1] At common law, dower was recoverable in a real action, in which damages made no part of the judgment. The statute of Merton, gave damages to the dowress, in certain cases, and since then, until lately, in England, both at law and in chancery, the profits in arrears, from the husband's death, are given under this name; 10 Ohio 16; 5 Munroe, 283. It has been held, in Maryland and Virginia, that the widow is only entitled to an account of profits, as against the alienee of the husband, from the date of the subpœna, 4 Leigh, 498; 5 Gill and Johns 121. But contra, in New Jersey and Pennsylvania, 4 Harr. Rep. 246; 7 Watts, 533.

[2] 4 Paige, 98; 1 Desaus, 109; 4 Johns. Chy. 271. There is some diversity among the several States, in the assignment of dower, as to the mode of estimating the value of the dowable land, in the hands of a purchaser. The rule which generally prevails, is, that the widow is entitled to the increased value, arising since the time of alienation, from extrinsic causes, but not that, which is owing to improvements made by the purchaser, 3 Massa. 544; 5 Serg. & Rawle, 289; 3rd Mas. 375; 3rd Shep. 160; 7th Dana, 160; 6th Ohio, 76; 5th Black. 406; 3rd How. Miss. 372. The doctrine has been laid down differently in New York and Virginia, and the widow confined to the value of the land at the period of assignment, 11th Johns. 510; 4th Leigh. 498.

[3] This question has been considered in South Carolina, and in Ohio, and the Court in each instance, held, that the plea was no defence against the legal title, 4 Desaus. 289; 10th Ohio 498.

CHAPTER XIII.

MARSHALLING OF SECURITIES.

1. PRINCIPLES OF THE JURISDICTION IN MARSHALLING SECURITIES.
2. MAY A DEBTOR REQUIRE HIS CREDITOR TO EXHAUST A DISTINCT SECURITY BEFORE BRINGING A PERSONAL SUIT.[1]

1. When and on what grounds do Courts of Equity marshal securities?

The jurisdiction is founded upon the same principles as that which is exercised in the marshalling of assets, viz; that one man shall not wantonly use his rights to the prejudice of another. A familiar case is, where two funds of a common debtor are avail-

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1 "This doctrine was much discussed in cases respecting the estates of the American loyalists, which being confiscated, subject to their debts, it was contended that a creditor ought to be restrained from pursuing the debtor personally here, till he had applied to make that property available to the payment of the debt. In several of the cases upon the subject, Lord Thurlow, Lord Kenyon, and Lord Rosslyn, expressed decided opinions in favor of the relief so prayed, upon the principle, that if it appeared, that there was in the hands of the creditor, either possession of the estate in fact, or the clear means of affecting that possession, he ought to be called upon so to do; or at least the Court should interpose, the creditor not having the power of assigning to the debtor those means, which he had of affecting the property. In the last of these cases, the bill was dismissed upon the particular circumstances, as it did not appear that the creditor had the means of making his demand effectual against the fund arising from confiscation; Lord Eldon,

able to one of his creditors, but a single fund only to another. The former will be restrained from exhausting that fund, which is the only resource of the latter, unless it appears that the restriction would operate to his injury. Thus, where two estates are mortgaged to A for the same debt, and one of them to B, B may require A to resort for satisfaction, in the first instance, to that security which he cannot touch. The same principle is applied where there are two judgment creditors of a common debtor. It has also been held, both in England and America, that the alienee of a portion of a tract of land bound by a judgment, may compel the creditor to apply the remaining part of the land to the extinguishment of his debt, before proceeding against that which has been sold. This jurisdiction will not be exercised, except in the case of a common debtor, and when the double fund is subject to the same debt, and where it will in no wise prejudice the just claims of the debtor, the creditor, with the two securities, or innocent third persons.

2. Will a Court of Equity require a creditor, whose debt is secured by a fund, as well as the personal obligation of the debtor, to resort to the fund in the first instance?

It will not; at least on the application of the debtor. There is no principle of natural or conventional justice, by which a creditor may be restrained from electing between any of the remedies which he possesses, in virtue of his contract.

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however, in a most luminous judgment, expressed his dissent from the principles of those opinions. His Lordship thought, that as it could not be contended that under such circumstances the personal liability of the debtor is taken away, so it could not be law, that the remedies resulting out of that liability should be restrained, by confining the remedies to a particular fund of the debtor, which, in the original constitution of the debt, and the transaction forming the relation, the debtor did not propose, nor the creditor receive as the fund to be charged by the contract; that considering it as a pledge, if the effect of the contract was, that he should have all the remedies belonging to the nature of a pledge, and also personal responsibility, it was questionable whether the revolution would have operated to drive the creditor to the pledge, and compel him to give up the other remedy at the instance of the debtor; but that the difficulty was much enhanced when the pledge was not given to the creditor by the contract, but thrown to him by an act not his own." Eden on injunctions, page 62.

CHAPTER XIV.

PARTITION.

1. ON WHAT PRINCIPLES COURTS OF EQUITY ENTERTAIN JURISDICTION OF BILLS FOR PARTITION.

1. When will Equity entertain a suit for Partition, and upon what principles will the jurisdiction be exercised ?[1]

Courts of Equity have a general concurrent jurisdiction with Courts of Law, in cases of Partition, and it is unnecessary to state in the bill, any peculiar grounds of equitable interposition. This jurisdiction is founded, not only upon the want of any legal remedy in many cases, the writ of partition being very inadequate to the purposes of justice; but upon the more extensive remedial functions of Courts of Equity.[2] It is able to compel a discovery, to order an account, to remove impediments

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[1] Mr. Hoffman, in his Chancery Practice, says, that he has found no subject so difficult as that of partition, and that the lawyer, who can conduct successfully, to its close, a partition suit of moment, without a mistake, must be very vigilant, very studious, and very lucky, Vol. 2, page 160.

[2] In England, the writ of partition, has been, recently, abolished by statute, and the jurisdiction of Equity, is now exclusive. Proceedings in partition are generally regulated, in this country, by Statute. The following are some of the most important principles decided by the American courts:

which would embarrass a legal proceeding, and to decree a partition upon fair and equal terms. The great conceniveñce, if not absolute necessity of this jurisdiction will appear, from con-

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1. The power of a Court of Equity to grant partition, is not discretionary, but *ex debito* justitiæ; and wherever a plaintiff has a right to a partition at law, he has the same right in Equity.

2. A partition may either be upon an equitable or legal title. In the former instançe, chancery exclusively decides the right; for equitable titles belong peculiarly to that Court, and are true and perfect rights in its contemplation. Where the legal right is disputed and doubtful, the course has been, to retain the bill, and to send the plaintiff to establish his title at law, before a partition is granted him. But where the doubt and difficulty are only as to the extent of the undivided interests of the respective claimants, it is usual to direct a reference to Masters, to inquire and report, and thereupon to award the commission to make partition. 3 J. C. R., 304-5; 4 J. C. R., 276.

3. A suit for partition is a suit for the division of such rights and interests, as joint owners hold in the land; and it does not embrace the object of adjusting dormant claims, adverse titles, and real or pretended incumbrances, held by other persons. Such pretentions and incumbrances are not affected by the decree made in the suit for partition; and they remain to be asserted and resisted in some other course of proceeding, between proper parties. If in a suit for partition, between joint proprietors, it were necessary to litigate with every person who may have, or claim an incumbrance upon one or more of the shares, the suit might become excessively complicated; and instead of a simple course of proceeding, for the purpose of dividing or selling the rights of the co-tenants, the suit would involve the litigation and adjustment of claims foreign to the object of partition, and with which many of the joint proprietors would have no concern. 1 Hopk. C. R. 502-3.

4. The owner of an equity of redemption, and tenants in common, for life or years, may have partition of such interests among themselves, but without affecting the rights of judgment or mortgage creditors. 7 J. C. R., 140; 3 Fairfield, 320. So, there may be partition of a mere equitable estate; 1 Hoff. Chy. Rep., 21. But a bill will not lie on behalf of a mere reversioner; 2d Paige, Rep. 389. In the case of Walker *vs.* Dilworth, 2 Dal. 257, the question whether a tenant, by the courtesy, could maintain a writ of partition? was fully discussed, but in consequence of an amicable compromise, the question was not decided by the Court.

5. On a bill for partition, among the heirs of an estate, the Court of Chancery, of South Carolina, decreed a sale; and this power may be exercised, it seems, where a division cannot be made advantageously, or

sidering the manner in which it is exercised. First, a Court of Equity will require the parties in interest, to make suitable conveyances, according to the allotment of the Commissioners. This is a muniment of title, which cannot be obtained by a common law proceeding. If the parties are unable to execute a valid conveyance, from infancy or any other cause, the conveyances will be respited, till the disability is removed. Second, the writ of partition can only give specific relief, but Courts of Equity may so mould their orders as to conform to the considerations, growing out of the circumstances of the parties, or the condition of the property. They will administer relief, upon enlarged principles of justice. Thus, they will ordinarily assign to the parties, respectively, those portions of the estate, which will be of most value to them, or, direct compensation to be made, to a party who has erected valuable improvements; or, where there are several estates of different values, they will control the mode of partition, and impose terms upon the parties, so as to receive a fair and equal division. So, they will not only regard the rights of the original tenants in common, but the legal and equitable rights of persons deriving title under

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the land is unproductive to the children; 1 Desaus., 109. In 1 Hoff. Chy. Rep., 506, it was held, that if a fair partition be impracticable by metes and bounds, the Court may assign the use of the property, to each of the tenants, for alternate periods, or they may appoint a receiver and have the profits divided in just proportions, or they may direct a sale of the premises, in their discretion, as being the most easy and practicable disposition of the rights of the tenants.

6. A partition long acquiesced in, and acted upon by the parties generally, ought not to be disturbed on the simple ground of irregularity; though if unjust or illegal, it may be impeached by a party who never acquiesced. 5 Munf. 108,

7. Tenant in common of the personal estate, cannot have partition at common law; and therefore, whether the title is legal or equitable, the Court of Chancery, is the proper tribunal to decree a partition. 4 Rand. 95.

8. Chancery will relieve, in cases of mistake, in the division of lands, and if the part to be restored, has been sold to innocent purchasers, will not decree other lands in exchange, but damages, according to the unimproved value of the lands, at the time of the decree. 3 A. K. Marsh. Rep., 314; 2 Simons & Stuart, 455.

them, and will, if necessary, direct a distinct partition of each of several portions of the estate, in which the alienees have a distinct interest, in order to protect that interest.[1]

[1] It has been decided in Ohio, that a tenant in common, may work a division of the common property, by conveying his share in a deed, defining its limits, by metes and bounds. As between the co-tenants and the purchaser, the effect of such a deed, is to give to such a purchaser, the proportional interest of his grantor, in that part of the common property described in the deed. 2 Ohio, 113; 6 Ohio. 398. In the first of these cases, Judge Burnet dissented from the opinion of the Court, and a different doctrine generally prevails elsewhere. The right to have the partition made by jurors or commissioners, is an incident to the estate, of which, one tenant cannot deprive another, without his consent. 3rd Yerg., 492; 2 Conn., 244; 3rd Sumn., 184; 24 Pick., 329.

CHAPTER XV.

PARTNERSHIP.

1. REMEDIES BETWEEN PARTNERS AT LAW.
2. FUNCTIONS OF COURTS OF EQUITY IN CASES OF PARTNERSHIP.
3. HOW THE REAL ESTATE HELD BY A PARTNERSHIP IS REGARDED IN EQUITY.
4. PRINCIPLES UPON WHICH COURTS OF EQUITY DISTRIBUTE THE ASSETS OF A PARTNERSHIP.
5. PARTNERSHIP DEBTS ARE CONSIDERED AS SEVERAL, IN EQUITY.
6. WILL EQUITY INJOIN THE SALE OF PARTNERSHIP PROPERTY TAKEN ON EXECUTION, FOR THE BENEFIT OF A SEPARATE CREDITOR OF ONE PARTNER.

1. What remedies have partners against each other at law?

Where any express stipulations in the articles of partnership, have been violated by one partner, an action of assumpsit or of covenant, as the case may require, will ordinarily lie, to recover damages for the breach thereof. The action of account is the appropriate, and except under peculiar circumstances, the only remedy at law for the final adjustment and settlement of partnership transactions, or for a contribution by one partner against the others, for money advanced by him on behalf of the partnership. But the difficulties which embarrass that action, are especially applicable to partnership transactions, when the production of books and papers, and the personal examination of the partner is indispensable to the purposes of justice.

2. What are the most important remedial functions exercised by Courts of Equity in cases of partnership?

First, a Court of Equity, on behalf of a partner or a third person, may ascertain and establish the existence of a partnership, either where the written articles have been suppressed, or where none were ever executed. Second, a Court of Equity may decree the specific execution of a contract to form a partnership, or of any one of its stipulations; as, for example, that the connection of one party with the partnership should be recognised in the name used by the firm. Third, a Court of Equity may interpose by injunction to prevent the violation by one partner of any of his express or implied obligations. Thus, a partner may be restrained from engaging in any other business, or the profits which he makes in it, be sequestered for the benefit of the partnership; or from wasting the partnership property; from misusing the partnership name; from interfering to stop the partnership business; or from fraudulent practices injurious to the partnership. So, a Court of Equity will not permit either party to dissolve a partnership, where no term has been fixed for its duration, under circumstances of ill faith, or in a manner to do irreparable injury to the other. Fourth, a Court of Equity may dissolve a parnership for any sufficient cause. Such a cause may arise from the insanity or permanent incapacity of one of the partners; or from his gross misconduct; or from the impracticability of carrying on the business at all, or according to the stipulations of the contract. On a dissolution, the Court may decree an account of partnership transactions, appoint a receiver to close the business, and sell the property, and make a final distribution of the partnership effects. In such case, if it is deemed expedient, the Court may restrain one or all of the partners from collecting the debts, or disposing of the property of the concern. Fifth, where one partner advances money for the partnership, or where there are dealings between two firms, of which these are common members, there is no remedy at law, on the technical principle, that a partner cannot contract with himself. But Courts of Equity, looking to the substance, and not the form of the transaction, will grant such redress as may be required by the justice of the case.

3. How is real estate regarded in Equity, which has been purchased with partnership funds, and as partnership stock?[1]

The person clothed with the legal title to real estate, is at law considered as the owner, but where the equitable title is in another, Courts of Chancery regard him as a trustee for such person. This principle is applied in the case referred to, and the real estate is considered in Equity as personalty, to all intents and purposes, and subject to the equitable rights and liens of the partners and their creditors. Even as between the heirs and distributees of a deceased partner, the same construction will prevail, in the absence of any clear expression of the will of the deceased, that the estate should go to his heir at law beneficially.

4. On what principles do Courts of Equity apply the assets of a partnership, as between the partners and their joint or separate creditors?[2]

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[1] The rule as stated in the text is generally recognised in this country. According to Chancellor Kent, the simple fact of an investment of partnership funds in real estate for partnership purposes, is sufficient to give to it the character of personalty, as between the heirs and the distributees. See the subject treated at large in a note to the 3d vol. of his Commentaries page 39. Besides the authorities there cited, the same general views are laid down, in 5 Metcalf, 562; and 5 Alabama, 446; 1 Dev. and Batt., 524; 4 B. Mon., 459, 489. Contra, 1 Appleton, 16; 3 V. E. Howard, 360; 3 Bibb, 506.

[2] The doctrine as laid down in the text, has not been universally recognised in this country. In Vermont, it has been held that partnership creditors have no priority over a creditor of one of the partners, even as to partnership effects. 2 Verm. Rep., 120. So, in Pennsylvania, joint and separate creditors are allowed to come in under the insolvent laws, *pari passu*, for a distributive share of the estate of a deceased partner, whether the fund be a separate or a partnership fund. 5 Serg. and Rawle, 78. And, in Georgia, a separate judgment creditor of a partner, may levy on the partnership effects, and sell his debtor's undivided interest therein, without reference to the claims of the creditor's of the firm. R. M. Charl. Rep., 87. In Maryland, it was held in 1 Harr. and Gill., 96, that at law, the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, without restriction from a Court of Equity; yet where, by the death of one of the parties, the legal right survives against

Upon the dissolution of a partnership each partner has a lien upon the partnership effects, as well for his idemnity as for his proportion of the surplus. The creditors of the partnership have no lien upon its effects for their debts; but in a Court of Chancery, the Equity of the partners over the whole funds, will enure to their benefit. On this principle, the partnership property is applied to the satisfaction of their claims, in preference to those of the separate creditors of the partners. On the other hand, the separate creditors of each partner are entitled to be first paid out of the seperate effects of their debtor, before the partnership creditors can claim any thing; which, also, can only be accomplished by the aid of a Court of Equity; for at law a joint creditor may proceed directly against the separate estate.

5. When the partnership has been dissolved by the death of one partner, may the joint creditors proceed in the first instance against his separate estate?

The doctrine seems now to be established, that a Court of Equity will consider a partnership debt as joint and several; and consequently, that a joint creditor has an election to proceed at law against the survivors, or in Equity against the estate of the deceased partner, and this whether the survivors are insolvent or not.[1]

6. Where at law, an execution is levied on the joint property, to satisfy the separate debt of one partner, will a Court of Equity restrain the sheriff from selling?[2]

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the surviving partner, and is extinguised against the deceased partner, that Court will give to the separate creditors, all the advantages thus thrown upon them by accident. Vide, also 2 Harr. and McHen., 463.

On the other hand, in Ohio, the separate individual creditors of one deceased member of a firm, cannot claim a preference in the decedents individual estate, against the creditors of the firm. 6 Ohio, 103.

[1] In 2 Conn., New Series, 384, it was held, that the effects of a deceased partner could not be pursued either at law or in Equity, while the surviving partner continued solvent. The same rule has generally prevailed in the United States. 2 John. Chy. Rep., 508; 1 Gall., 371; 3 Paige Rep., 173.

[2] The rule as laid down by Chancellor Kent, in 2 J. C. R., 548, that a Court of Equity, on the applicaiion of the judgment debtor,

Although the authorities are very conflicting, yet it would seem to be the better rule for Equity to interpose. To save the judgment debtor from the ruinous sacrifice to which the sale on execution of an unascertained interest, must lead, to preserve to the other partners their lien on the property for any ultimate balance which may be found due to them, and to prevent a multiplicity of suits; a Court of Equity should injoin a sale, until the account is taken, and the share of the partner ascertained. But in any event, the sheriff can only sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners, and the joint creditors. The purchaser is substituted to the rights of the execution partner, quoad the property sold, and becomes a tenant in common thereof, and he may file a bill, or a bill may be filed against him by the other partners, to ascertain the quantity of interest which he has acquired by the sale.

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ought not to injoin a sale by the sheriff, upon the ground that no harm is done to the other partners, has been adopted in Mississippi, 1 Freem. Rep., 78; and in Connecticut, 4 Conn. Rep., 540. In the American Jurist, vol. 8, page 8, the doctrine of the text is sustained, and also in New Jersey, 1 Green's Chy. Rep., 163. Phillips *vs.* Cook, 24 Wen., 359, is a case in which the amount of interest that may be sold on an execution at law, against one partner, is elaborately considered, and all the authorities reviewed.

CHAPTER XVI.

RENT.

1. JURISDICTION OF EQUITY TO DECREE THE PAYMENT OF RENT.

1. When do Courts of Equity enforce the payment of Rent?

The jurisdiction proceeds upon the general principle, that where there is a right, there ought to be a remedy. If rent is due, and the person who is entitled to receive it, can neither distrain, nor bring a suit at law; and if he is thus remediless, without any laches of his own, a Court of Equity will grant relief. Such a case may occur from the loss of the deeds by which the rent is evidenced, or from confusion as to the boundaries of the land, out of which it shall issue; or when the time or the amount of the payment is uncertain; or when equitable relief, such as a discovery, or an account, or an apportionment, is necessary. So, when premises are in the possession of a sub-tenant, and the original lessee is unable to pay the rent, the lessor may recover it in Equity, from the former, although not at law, from the want of any privity of contract between them. The rent is regarded in Equity, as a trust or charge on land, which he who has enjoyed the rents and profits, is bound to discharge. In the exercise of this jurisdiction, Courts of Equity follow the law, and impose no farther liabilities than it recognises.[1]

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[1] 4 Johns., 6 Rep. 290; 1 Freem. Rep., 99.

CHAPTER XVII.

RECISSION, CANCELLATION, AND DELIVERY OF INSTRUMENTS.[1]

1. JURISDICTION OF EQUITY IN THE RECISSION, CANCELLATION, AND DELIVERY OF INSTRUMENTS.
2. COURTS OF EQUITY WILL NOT ENTERTAIN A BILL FOR THE DELIVERY OF AN INSTRUMENT, WHERE THE ILLEGALITY IS APPARENT ON ITS FACE.
3. MODE OF ASCERTAINING THE VALIDITY OF A CONTESTED INSTRUMENT.
4. WHEN COURT OF EQUITY WILL ENTERTAIN SUITS FOR THE RECOVERY OF SPECIFIC CHATTELS.

1. When, and on what grounds, do Courts of Equity direct the recission, cancellation, or delivery of instruments?

The jurisdiction which they exercise, is in the nature of a preventive or protective justice; and is entertained, not as a matter of absolute right, but of sound and reasonable discretion; and relief will be granted only upon such terms, as the justice of each case may require. It is a portion of that exten-

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[1] There is a large class of cases, in which the jurisdiction of Equity to grant relief, attaches as an incident, to a bill of discovery. The principles applicable to such cases, have been already considered. Ante, page 25.

sive remedial justice, technically called, *quia timet*, and is intended to provide against probable future injury. The following are the most usual cases in which it is applied: First, where one person is in the possession of an instrument, which may, at a future period, be used to the injury of another, or which covers his title with a cloud of suspicion, the latter has a right to come into Equity, and demand its cancellation and delivery, on showing that he has a good defence to it, at law, or, *a fortiori*, one which is only available in Equity. Second, Courts of Equity, in consequence of the inadequacy and imperfection of the legal remedies of detinue and replevin, will decree the specific restitution of deeds, negotiable instruments, and other evidences of property, when they are wrongfully withheld from those who have a legal or equitable title to their possession. Thus, an heir, may recover the title deeds to his estate, when they are improperly detained from him. So, where any person has an interest in a deed or writing, which is in danger of being lost or destroyed, a Court of Equity, will either require the instrument to be brought into Court, for preservation, or security to be given for its future delivery. Third, and these cases are scarcely distinguishable from those of the first class; where an instrument, originally valid, has become *functus officio*, by payment, or other legal or equitable extinguishment, a Court of Equity, will, on similar principles, order it to be delivered up and cancelled.[1] This doctrine embraces all cases where it is fairly inferable, from the acts or conduct of the party entitled to the benefit of the instrument, that he has intended to release it. There is no distinction, in the view of a Court of Equity, between an instrument utterly void, and one that is merely voidable. If an instrument ought not to be used or enforced, then it is against conscience for a party to retain it, to the possible prejudice of another.

2. Will a Court of Equity interfere, where the illegality of the instrument is apparent on its face?[2]

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[1] 1 Paige Rep., 215; 1 Freem., 75.

[2] Chancellor Kent, in 1 John. Chy. Rep., 517, says that "the weight of authority, and the reason of the thing, are equally in favor of the ju-

If the nullity of the instrument is apparent, the reason for the interference of Equity does not exist, and it will, in such a case, decline taking jurisdiction.

3. How does a Court of Equity ascertain the validity of a contested instrument?

It will ordinarily decide the point itself, but where the evidence is contradictory or obscure, it will direct an issue at law.

4. Will Courts of Equity entertain bills for the delivery of specific chattels?

They will not, where the loss of the chattel admits of full compensation in damages, as Courts of Law can afford adequate relief. But, where the chattel is of peculiar value or importance, they will take jurisdiction, and compel its specific delivery; as in the case of a family relic, or heir-loom, a painting by a distinguished artist; an ancient bust, and things of a kindred nature.

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risdiction, whether the instrument is, or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause, and these assumed distinctions are not well founded. If, however, the defect appears on the bond itself, the interference of the Court will still depend on a question of expediency, and not on a question of jurisdiction." The same doctrine is held in Tennessee. 2 Yerger, 524; 10 Yer., 60. In 6th Peter's Rep., 95, it was decided that a Court of Chancery, would not order a deed to be delivered up, which was void at law, for matters appearing on its face, unless other circumstances were shown, disclosing a case "proper for the interference of a Court of Equity."

CHAPTER XVIII.

SPECIFIC PERFORMANCE OF AGREEMENTS AND OTHER DUTIES.

1. GENERAL NATURE OF THE JURISDICTION FOR SPECIFIC PERFORMANCE.
2. SPECIFIC PERFORMANCE OF PERSONAL CONTRACTS.
3. HOW COVENANT BY HUSBAND, THAT HIS WIFE SHALL EXECUTE A CONVEYANCE REGARDED.
4. GENERAL PRINCIPLES AS TO THE SPECIFIC PERFORMANCE OF REAL CONTRACTS.
5. WHEN TIME IS OF THE ESSENCE OF A CONTRACT.
6. SPECIFIC PERFORMANCE OF PAROL CONTRACTS, RESPECTING LAND.
7. SPECIFIC PERFORMANCE OF OTHER PAROL CONTRACTS.
8. PARTIES BETWEEN WHOM A BILL FOR SPECIFIC PERFROMANCE WILL LIE.
9. PRINCIPLES APPLICABLE TO VOLUNTARY CONTRACTS.

1. What is the general nature of the jurisdiction exercised by Courts of Equity, in decreeing the specific performance of contracts?[1]

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[1] In the case of Garnett *vs.* Macon et al, reported in 6th Call., 308, and afterwards republished, in 2d Brock., 185, the doctrine of specific performance, is discussed with a learning and ability, that will amply repay the diligent perusal of the student. Dessaussure's Reports, (South Carolina,) contain an unusual number of instructive cases on the same subject.

The specific performance of agreements, and other duties, is a very ancient and most important branch of equitable jurisdiction. It is a remedial function, which Courts of Law, are incapable of exercising, but which, from the insufficiency of damages, in many instances, as a compensation for the breach of a contract, is indispensable for the purposes of justice. It cannot be claimed, in any case, as a matter of right, but always rests in the discretion of the Court; a discretion to be exercised, not arbitrarily, but so as to harmonize the rules of law, with the dictates of equity. No contract will be enforced, which is not certain, just, and fair, in all its parts;[1] or which involves a breach of trust, or is immoral, or contrary to public policy; or, which is merely voluntary, and founded upon no valuable or meritorious consideration; or, where a performance has become impossible, or, where the party seeking the specific execution, has been in

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[1] The doctrine is laid down in 6 Metcalf, 346, and 1 Rice Eq. Rep., 84 and 4 Desau., 656; that in order to prevent a decree for specific performance of a contract, on the ground of inadequacy of consideration, the inadequacy must be so gross, and the proof of it so clear, as to lead to a reasonable conclusion of fraud or mistake. This doctrine, however, seems inconsistent with some of the authorities. Mere inadequacy of price, says Chancellor Kent, although not sufficient to induce a Court to set aside a transaction, may be good ground for refusing the specific performance of a private agreement for the sale of lands; and for leaving the party to seek his compensation in damages at law; especially where the inadequacy is so great as to give an appearance of unreasonableness, inequality, or hardship, to the coutract. 2 J. C. R., 23; 2d Black., 439, 440. The argument against the interference of Equity, is very strong in those cases, wherein it is considered that the Court must act *ex vigore*, and carry the contract into execution, with unmitigated severity. By sending the party to law, relief can be afforded in damages, with a moderation agreeable to Equity and good conscience, and the claims and pretensions of each party, may be admitted to govern the assessment. 6 J. C. R., 232. Equity will not, however, refuse the execution of an agreement on the ground of inadequacy of price, where the vendor, with full knowledge of the circumstances, has refused to rescind and holds on to a part of the purchase money. 12 Ohio, 354. Mere inadequacy of price, unattended by any circumstance of fraud, surprise, etc., is no ground for refusing the specific performance of a purchase at auction. 7 Ves., 30; 8 Ves., Jr., 137.

fault, or where, under all the circumstances, it would be inequitable. But, provided there is a binding agreement, the form or character of the instrument, by which it is evidenced, are immaterial. It is not to be inferred, however, that it will decree the specific performance of all *bona fide* contracts, although it would be consistent with the principles of justice, that a party who has been injured by the breach of a contract, should have an election, either to take damages at law, or to require a specific performance in Equity. The right is much more restricted, as will be seen by considering the three classes of cases, in which the application is made, to wit: (1) where the agreement[1] respects personal property; (2) where it respects personal acts; (3) where it respects real property. The ability to recover dam-

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[1] It is a general rule, that covenants for personal service, cannot be specifically enforced, either at common law or by statute. The case of apprentices, depends on parental authority; that of soldiers and sailors, on national policy. 1 Black., 122.

In the highly ludicrous case of De Rivafinoli *vs.* Corsetti, the question wether a contract to perform personal services, can be enforced, was elaborately discussed, and the jurisdiction seems to have been conceded. The defendant had agreed with the complainant, to sing, gesticulate, and recite, in the capacity of *primo basso*, in all the operas, farces, oratorios, etc., and not to exhibit at any other theatre. Chancellor Walworth facetiously remarked: "Upon the merits of this case, I suppose it must be conceded, that the complainant is entitled to a specific performance of the contract; as the law appears to have been long since settled, that 'a bird which can sing, and will not sing, must be made to sing.' (Old adage.) In this case, it is charged in the bill, not only, that the defendant can sing, but, that he has expressly agreed to sing, and to accompany that singing with such appropriate gestures, as may be necessary to give an interest to that performance. And, from the facts disclosed, I think it very evident that he does not intend to gratify the citizens of New York, who may resort to the Italian opera, either by his singing, or his gesticulations. Although the authority before cited, shows the law to be in favor of the complainant, so far at least, as to entitle him to a decree for the singing, I am not aware that any officer of this Court, has that perfect knowledge of the Italian language, and possesses that exquisite sensibility in the auricular nerve, which is necessary to understand and enjoy, with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty then, even, if the defendant was compelled to sing in

ages at law, seems at one time, to have been regarded, as a test of the jurisdiction in Equity. But this doctrine, if it was ever established, is now to be regarded as overruled. Courts of Equity, guided by an enlarged discretion, will grant or withhold relief, according to the circumstances of each case, sometimes following the law, and sometimes going far beyond it.

2. When will Courts of Equity decree the specific perform ance of personal contracts ?

Courts of Equity will not decree their specific execution, when, as is ordinarily the case, damages at law, will furnish a complete and satisfactory remedy. Such, for example, are contracts for stock, or merchandize, which have a fixed market value. The rule does not apply to chattels, possessing a peculiar value, or as it has been called *pretium affectionis*; nor to any other personal contracts, in which a jury possess no fixed standard, to guide them in the assignment of damages.[1] Thus, an agreement to enter into a partnership, to pay an annuity, to sell a secret in trade, to indorse a bill of exchange, will be specifically enforced, for the injury which may be sustained, by the breach of these contracts, cannot be certainly ascertained. An injunction will sometimes be granted, operating as a specific performance. For example, a tenant will be restrained, from violating a covenant, with his landlord, not to dig coal, or plough a meadow, or remove manure, at the end of his term. It is a question on which the authorities are yet unsettled, whether a covenant to build, will be enforced. The better opinion seems in favor of the jurisdiction, where the contract has sufficient definiteness and certainty; for, there are many considerations, arising out of the

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the presence and under the direction of a Master in Chancery, in ascertaining whether he performed his engagement, according to its spirit, and intent, etc."

But, as the time had not arrived, for a performance of his contract, the Chancellor refused a writ of ne exeat, against the defendant, to prevent his going out of the jurisdiction of the Court, though he had entered into other engagements. 4 Paige, 264.

[1] The specific performance of an agreement, to execute a policy of insurance, will be decreed. 8th Ohio, 504; 2d Phillips on Insurance, 582.

character and circumstances of the parties, and the lapse of time, which must render the damages for its violation, conjectural. Besides, the prevailing disposition of the Court is, not to restrict, but to enlarge this branch of equitable jurisdiction. In cases where the specific performance of a contract, respecting chattels, will be decreed, the remedy is mutual, between the vendor and purchaser, and relief will be extended to the former, even if it consists merely of compensation in damages.

3. Will a Court of Equity decree the specific performance of a covenant by a husband, that his wife shall execute a conveyance, or perform any other acts ?[1]

There is no little diversity of opinion on this subject, but the later and better authorities are opposed to the jurisdiction. It may be morally impossible for the husband to obtain the concurrence of the wife, and it is, at all events, inconsistent with the policy of the law, that he should be required to use any undue influence, or unjustifiable means to procure the surrender of her rights. It would be offering him a premium, to be ungenerous, as well as unjust. The objection does not prevail, where the wife is ready and willing to consent to the act, but no decree should be rendered in a matter so vitally affecting her interests, unless she is brought directly before the Court, and her consent upon full deliberation obtained.

4. By what general principles are Courts of Equity governed, on applications for the specific performance of real contracts ?

First, It is no objection, that the land is not situate in the State or country where the suit is brought, as the primary decree in Equity is in *personam*, and not *in rem*. Where the party who is bound by a decree, is a resident within the territorial

[1] A husband contracts to sell his wife's land; upon a bill in Chancery, by the husband and wife, against the purchaser, to compel a specific execution of the agreement, it *seems*, specific execution shall not be decreed, because specific execution could not be decreed, at the suit of the purchaser, upon a bill against the husband and wife, to compel her to convey her land, and so, the remedies are not mutual. At any rate, upon such a bill, a decree for specific execution, against the purchaser, before the wife shall have executed a deed conveying the land, though the decree be suspended, till she shall execute such a deed, is erroneous. Watts and others *vs.* Kinney and wife; 3rd Leigh., 272.

jurisdiction of the Court, he may be compelled to perform his agreement according to conscience and good faith. Thus, it was held by Lord Hardwicke, that the specific performance of a contract, respecting the boundaries of the colonies of Pennsylvania and Maryland, entered into by the proprietaries, might be decreed by the Court of Chancery of England. But the Court will put the successful party into possession, where the lands lie within the reach of its process, and the adversary party refuses to comply with the decree. Second, the jurisdiction to decree the specific performance of a contract respecting land, is universal, as it is supposed in every case to possess a peculiar value in the eyes of the purchaser, which will not admit of adequate compensation in damages. Third, Courts of Equity do not confine themselves to cases, where there is a strictly legal title to relief; but wherever the party seeking its aid has been in no default, and is entitled to favor, they will decree a performance, if the failure is not a matter of substance. Fourth, the specific execution of a contract will not be decreed, unless all its terms are clearly and definitively ascertained. This rule is applicable, both to parol agreements, where by part performance they have been taken out of the Statute of Frauds, and to written contracts. Fifth, specific performance will not be decreed, where the plaintiff seeks to alter or add to the written agreement, by the introduction of parol evidence, unless indeed the omission has been owing to fraud, or in cases not within the Statute of Frauds, to a clear mistake.[1] A defendant will be permitted to use evidence in resisting a decree, which a plaintiff would not be allowed to use for the purpose of obtaining it. Thus, he may show by parol evidence, that material terms have been omitted in the written agreement, or, that it has been subsequently altered, or, that it has been discharged by parol.[2] The ground of this doctrine is, that Courts of Equity

[1] Vide, the principle laid down in answer to question 12, on page 40, and also Am. Jurist, 3 vol., 39.

[2] 1 J. C. R., 430; 2 J. C. R., 405; 3 Hump., 585. When the purchaser of land by parol, is put in possession, the vendor cannot set up a naked parol agreement to rescind. As part performance was necessary to vest an interest in the purchaser, so the same is required to divest his title. 13 Oh., 408.

are under no obligations to be active in enforcing a claim, unless under all the circumstances, it is just. Sixth, Courts of Equity do not require, as a condition to a specific performance, a literal compliance with all the terms of an agreement. They do not favor forfeiture, but compensation. Where the party seeking its assistance has been guilty of no laches or unnecessary delay, and can substantially execute the consideration bargained for, the contract will ordinarily be enforced. Thus, a slight inaccuracy as to the quality or quantity of the land, will not be allowed to defeat the manifest intention of the parties. So, a vendor will be relieved, who, although unable to make a good title at the time, subsequently cures the defect, and seeks the performance of the contract within a reasonable period.[1] Seventh, Courts of Equity will not enforce a contract against the vendee, where there is a substantial defect, either in the quantity, quality, or title of the thing sold. But he will, in general, be permitted to elect, whether he will proceed with the purchase *pro tanto*, or abandon it altogether.[2] He may call upon the vendor for a specific performance, so far as it can be performed, and have an abatement out of the purchase money, or compensation for any defect touching the estate.[3]

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[1] 3 Bibb, 366; 1 Paige, 244; 1 Wheat., 178; 3 Cowen, 445; 6 Peters, 393.

[2] A purchaser buying with full notice of a defect in the title will not for that defect be releived in Equity. 5 V. E. Howard, 284; 3 Marsh., 288; 13 Serg. and R., 386; 2 Wheaton, 13. But constructive notice of incumbrances does not take away the right to object to specific performance. 11 Johns., 525.

To constitute a good defence at *law*, against the claim of purchase money, the defect of title must be total: a mere *partial* defect is not inquired into by a Court of Law, but the party must seek relief in Chancery. 2 Wheaton, 13, 16; 4 V. E. Howard, 452; 2 McL. R., 464.

[3] But there is a distinction as to the right to the specific execution of a contract of sale, (where the vendor cannot convey the whole land) between the case, where the vendee seeks to compel the vendor to a specific performance, and where the vendor resorts to Equity to compel a specific performance on the part of a vendee. In the former case, Equity will decree a specific performance; not so, in the latter.

5. Do Courts of Equity regard time as of the essence of a contract?[1]

They do not, where circumstances of a reasonable nature, have disabled a party from strict compliance in point of time. But the party seeking specific performance, must not have been guilty of such gross delay, as to compromise the rights and interests of the other party. Time may be made, however, a substantial, and not a mere formal circumstance, by express agreement; or the nature and conditions of the contract itself may render it an essential element.

6. When will Courts of Equity decree the specific performance of a contract respecting land, which is within the provisions of the Statute of Frauds?

That statute declares, that no action shall be brought upon any contract for the sale of lands, or any interest in them, unless the agreement upon which the suit is brought, or some memo-

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2 Bibb, 410; 3 J. R., 450; 2 Iredell, 286, 407; 9 Johns. Rep., 450; 11 Peters, 229.

In Virginia, it has been decided, that where the purchaser of land cannot get a title to all he contracted for, if he can obtain the substantial inducement to the contract, he may insist upon taking it, or he may be compelled to accept so much as the other party can make a good title to, with compensation for the residue. 2 Rand., 120; Vide, also 6 Paige, 407.

[1] "Where a Court of Equity holds, that time is not of the essence of a contract, it proceeds upon the principle, that having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretence and evasion." 1 Sim. and Stuart, 599. The rule, that time is not of the essence of the contract, in Courts of Equity, is not universal. Circumstances may be so changed that the object of the party can no longer be accomplished; that he who is injured by the failure of the other contracting party, cannot be placed in the situation he would have occupied, had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and a Court of Equity will leave the parties to their remedy at law. 6 Wheat., 533. The same principle is affirmed in 2 Brock., 185. To the same effect is the decision of the Supreme Court, in 14 Peters, 173. The parties may, by their agreement, make *time* of the essence of the contract. 2 Edw., 78; 8 Paige, 601; 1 Johns. Chy. Rep., 370; 4 Johns. Chy., 559; 1 Desau, 307; 7 Ohio Rep., 92; 7 Paige, 22; 3 Leigh., 161.

randum or note thereof, is in writing, and signed by the party or his lawful agent.[1] Although this statute is in terms as obligatory upon Courts of Equity as Courts of Law, yet a most extensive and beneficial exercise of equitable jurisdiction consists in withdrawing from its operation a number of cases, in which a rigid adherence to its provisions would be subversive of the objects it was enacted to promote. And, First, Courts of Equity will enforce the specific performance of a contract, not in writing, where it is fully set forth in the bill, and confessed by the answer of the defendant. But it is now fully established, both in England and America, that even where the answer confesses the agreement, if it insists upon the protection of the statute, the defence must prevail at a competent bar.[2] Second, where a

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[1] It has been a question, whether sales at auction were within the provisions of the Statute of Frauds. It is now settled, that they are, and that the auctioneer may be the agent of both parties, and his signature to an entry in his books, or to a memorandum stating the terms of the contract, and the parties thereto, or which refers to the particulars or conditions of sale, or is endorsed thereon, will satisfy the Statute of Frauds. 2 McCord Ch., 164; 2 Kent, 540; 11 Ohio, 109. The memorandum in the auctioneer's sale book must be made at the time and place of sale. 12 Wendall, 548.

But if the conditions of sale were not attached to the catalogue, or made known to the purchaser, putting down his name and the price he offered, opposite the lot in the catalogue, will not satisfy the statute. 2 Barn. and Cress., 947.

It is immaterial whether the note or memorandum be made by the clerk or auctioneer, and whether the clerk was appointed by the auctioneer or the agent of the vendor for making the sale. 7 Leigh., 165.

Although the Statute of Frauds requires an instrument to be in writing to bind the party, he may, without writing, authorise an agent to sign it in his behalf, unless the statute positively requires that the authority should be in writing. 2 Kent, 613-14; 9 Leigh., 387. But see contra decision in Pennsylvania, 2 Dallas, 246; 2 Yeat., 38; 6 Serg. and Rawl., 90.

But a sale before a master, is not within the Statute of Frauds. The judgment of the Court in confirming the report, takes it out of the statute. 3 Caines, 64; 12 Ves., 472; 1 Ves., 218.

[2] Where there was a bill filed for the specific performance of a parol agreement concerning lands, and the defendant pleaded the Statute of Frauds, and also answered, and in his answer admitted the agreement, and that he had taken possession, and held under it; the Court held,

contract has been partly executed, and thereby one party put into a situation which is a fraud upon him, unless the agreement is fully performed, a specific execution will be decreed. It is sometimes difficult to ascertain what acts will constitute this part performance, in the view of a Court of Equity. (1.) No preliminary proceedings are considered such, although attended with expense, if they are merely introductory or ancillary to an agreement; as, for example, going to see an estate, giving directions for a conveyance, admeasuring lands, &c. (2) Payment of a portion of the purchase money, whether the sum is large or small, does not amount to part performance;[1] because the express provision in the statute, that part payment by way of earnest, on the sale of personal chattels, shall operate as a part performance, excludes by inference the same rule on agreements for the purchase of land; and, moreover, as the money may be recovered back at law, the case admits of a full and direct compensation. This ground, however, is not entirely satisfactory, as the party may become insolvent before the judgment at law can be executed. (3.) Admittance into possession under a parol agreement, is regarded as part performance;[2] for a man is liable to answer as a trespasser, or to account for rents and profits, unless his possession can be referred to the agreement. It would be a stronger case, if the vendee of land, on the faith of his parol contract, should proceed to make improvements upon the property. But the possession must have been obtained solely under the contract. Thus, where a tenant, or a man having entered upon land, as a trespasser, makes a parol agreement for its purchase, the case is not taken out of the

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that the admission in the answer took the case out of the statute, and decreed a specific performance against the defendant. 1 Desau, 350. When the defendant admits in his answer a parol agreement, and does not claim, either by plea or answer, the benefit of the statute, the Chancellor will not allow him to set it up at the hearing. 11 Ohio, 455.

[1] Contra, Harring, (Delaware) Rep., 532.

[2] 6 Harr. and John., 288; 1 Binney, 218; 14 J. R., 15; 9 Peters, 103; 1 Freem., 68; 3 Ohio, 294; 2 Scamm., 220. 1 Blackford, 58; 8 N. H. Rep., 9.

operation of the statute. Third, Courts of Equity will enforce the specific performance of an agreement, which was intended to be reduced to writing, but has been prevented by the fraud of one party. Thus, where a man treats for a loan of money on mortgage, and the conveyance is to be by an absolute deed of the mortgagor, with a defeasance by the mortgagee, if, after the absolute deed has been delivered, the mortgagee refuses to execute the defeasance, Equity will decree a specific performance.

The exceptions which have been thus established to the operations of the Statute of Frauds, have greatly impaired its efficacy and importance, and produced a general disinclination in the Courts to extend their practical application.[1]

7. Are there any other parol contracts void at law, which will be specifically enforced in Equity?

From the odium in which they hold fraud, Courts of Equity will, in many cases, enforce such contracts, to prevent a party from deriving an advantage from his own breach of duty and obligation. Thus, if one man, confiding in the parol promise of another to perform an intended act, omits to make a provision or arrangement for a third person, by will or otherwise, such promise will be specifically enforced in Equity.

8. Between what persons will a bill lie for a specific performance?[2]

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[1] A naturalized citizen had made a verbal contract for the sale of land, but died without consummating it, or leaving any written agreement or memorandum. The Court would not decree specific execution, to avoid the effect of an escheat; but permitted the escheater to plead the Statute of Frauds. The personal estate was suffered to pay the debts, and the lands to escheat. 3 Desau, 213.

[2] In making a sale under an order of Court, the executor acts as the instrument of the law. If the executor, by mistake or accident, fails to transfer the legal right, no doubt can be entertained that Chancery may, by requiring a release from the heirs of their legal right to the property, (and they have only a legal right) do justice to the purchaser. It would be carrying into effect a contract fairly made, and which imposed on the parties reciprocal obligations. 1 McLean, 84.

A contract of the ancestor was decreed to be performed, by the infant heir at law, who was allowed six months after coming of age, to show cause against it. 1 Desau, 109; S. P., 1 Desau, 201.

Where the specific execution of a contract will be decreed between the parties, it will be enforced between all persons claiming under them, in privity of estate, representation, or title. Thus, a person who purchases lands, with knowledge of a prior contract to convey them, is affected by all the equities attaching to the lands in the hands of his vendor, including the lien of the original vendor, for purchase money. On the other hand, the vendee, or any sub vendee, upon complying with their portion of the contract, may compel the vendor, or those claiming under him in privity, or a purchaser with notice, to convey title. It is to be recollected, that Equity considers every thing as done, which ought to be done, and in the case of an executory contract for land, the purchaser is regarded as the equitable owner of the land, and the vendor as entitled to the money. The heir of the purchaser may call for a conveyance of the title, and the personal representatives of the vendor demand payment of the purchase money.

9. Will Courts of Equity enforce the specific performance of voluntary contracts, or such as are founded upon no valuable or meritorious consideration?[1]

The rule seems to be established, that they will not, whether the volunteer seek to have the benefit of a contract, a covenant, or a settlement. The only well recognised exception to this doctrine is in cases of donations *causa mortis*.

But on a bill for a specific performance, the vendee will not be compelled to take a title founded on a decree against an infant, because the latter may show cause against it, when of age. 1 Dev. and Batt., 84. As the specific performance of a contract will only be enforced between the original parties, where its terms are clearly made out, this is *a fortiori*, the rule against an assignee. 2 Sumn., 298.

[1] Collateral consanguinity, such as that of a brother, nephew, or niece, does not furnish a *meritorious* consideration. 1 Mylne and Craig, 226; 1 Dana, 107; 1 Sand. C. Rep., 262.

CHAPTER XIX.

COMPENSATION AND DAMAGES.

1. WHEN COURTS OF EQUITY AWARD COMPENSATION AND DAMAGES.
2. MODE OF ASCERTAINING COMPENSATION OR DAMAGES IN EQUITY.

1. When will Courts of Equity give redress, by way of compensation and damages?[1]

Where compensation and damages constitute the sole objects of the bill, Courts of Equity, do not, ordinarily, entertain jurisdiction. The party must possess no adequate remedy at law, or some peculiar equity must attach to the case. Thus, for example, where one party has disabled himself from a specific performance, by matter, *ex post facto*, as by a sale, and the other, although entitled in Equity, to the completion of the contract, has no action at law, there seems to be a just foundation for the jurisdiction in Equity, to award compensation and damages.[2] But where compensation and damages are sought as an incident

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[1] 4 John. Ch. 559; 5 John. Ch. 193; 5 Cranch, 262, 275; 5 Munf. 29; 1 Little, 358; 1 Green. Ch., 269; 2 Bibb, 412, 434; 3rd Leigh, 667.

[2] Where the defendant had disabled himself from the specific performance before the filing of the bill, and the plaintiff knew it, and had a remedy at law, the Court refused to take jurisdiction for compensation and damages. 5 J. C. R., 196. Contra; 1 Cowen R. 711.

It was held in Ohio, that where a vendor has parted with the title, so that he cannot convey damages, are recoverable in Equity, on a bill for specific performance. 8 Ohio., 49.

to other relief, which the Court has a right to grant, the jurisdiction of Equity seems proper, on two distinct grounds; because, it is essential to the wholesome exercise of another acknowledged function, and to prevent multiplicity of suits. Thus, where a specific performance is decreed, the Court will direct an allowance to be made, for any deficiency in the quantity or quality of the lands sold.[1] Courts of Equity, however, have never gone so far, as to enforce, in a suit brought directly for that object, the claim of the bona fide possessor of land, for improvements made on the property, against the true owner who has evicted him. The propriety of thus extending the jurisdiction, is maintained by Judge Story, in Bright *vs.* Boyd, (1 Story's C. C. Rep. 494.) But Courts of Equity will not enforce the claim of a plaintiff, seeking its assistance, except on the terms of his allowing the defendant all the compensation, to which he may be entitled. Thus, where an innocent person has made improvements upon land, supposing himself to be the true owner, no equitable relief will be extended to the latter, such, for example, as an account of the rents and profits, unless he will allow the other party to deduct or recoup therefrom, a due compensation for his improvements.

2. In what manner do Courts of Equity ascertain the amount of compensation and damages?

By directing an issue of *quantum damnificatus*, to be tried before a jury, or, as is the more common mode, when the inquiries do not involve conflicting facts, by a reference to a master.

Where one, by fraud, obtains the legal title, and conveys it to an innocent purchaser, so that a former vendee cannot reach it, Equity will decree him, who thus fraudulently obtained the legal title, to pay the complainant in damages, the present value of the land. 4 Ohio, 244.

[1] When a bill filed to compel a performance of a parol contract, to compensate the plaintiff, for the use of his land, could not be sustained, the contract not being valid by the Statute of Frauds, yet the Court retained the bill, and awarded an issue of *quantum damnificatus*, to assess the damages sustained by the plaintiff, by the acts of defendants; as the plaintiff had sustained an injury, for which he ought to be compensated, and for which he had no remedy, or at least, a doubtful, and inadequate one at law. 1 J. C. R. 132; S. P., 274.

CHAPTER XX.

INTERPLEADER.

1. THE ORIGIN AND NATURE OF THE EQUITABLE JURISDICTION ON BILLS OF INTERPLEADER.
2. WHEN A BILL OF INTERPLEADER WILL LIE ON BEHALF OF A TENANT.
3. MAY AN AGENT BRING A BILL OF INTERPLEADER, WHERE PROPERTY RECEIVED FROM PRINCIPAL IS CLAIMED BY A THIRD PERSON.
4. DOES NOT LIE FOR SHERIFF, WHERE PROPERTY TAKEN ON EXECUTION IS CLAIMED ADVERSELY BY DIFFERENT PERSONS.
5. BILLS IN THE NATURE OF AN INTERPLEADER.

1. What is the nature and origin of the jurisdiction in Equity, on bills of interpleader?[1]

[1] Vide 6 J. C. R., 447; 1 Hop., 273; 3rd Bibb, 301; 1 Cow., 691; 2d Paige, 200; 2d Paige, 570, 4 Paige, 384; 8th Paige, 339; 8th Wheaton, 268; 1 Black, 299; 2d Edw., 648; 3d Edw., 71; 10 Gill and J., 358; 1 Sand C. Rep., 270, 380; 7th Dana, 410. A bill of interpleader can only be filed by one in possession. Therefore, where an administrator had never reduced the assets into possession, but they were in possession of some of the distributee's, who claimed adversely to him, a bill by him against the distributee's, praying that they might interplead, is improper. 1 Dev. Equ. Rep., 169. So, if the holder of the property, has parted with it, on receiving indemnity from one of the claimants, he cannot sustain a bill of interpleader. 1 Merivale, 405; 6 Conn. R., 421.

The remedy of interpleader, was allowed in no personal action at law, except detinue, and was then confined to cases arising out of privity of contract, or upon a finding. The obsoleteness into which the action of detinue has fallen, as well as the inadequacy and imperfection of the legal remedy, have in practice, led to an almost exclusive application to Courts of Equity, for relief, in this class of cases. Where two or more persons claim the same thing in different titles, whether legal or equitable, from another, who is a mere stake-holder, standing indifferent between them, the latter, if molested by a suit actually brought, or impending, may resort to a Court of Equity, and by compelling the claimants to litigate their rights, at their own expense, protect himself from all responsibility.[1] Thus, where the agent of an insolvent principal, has funds of the latter in his hands, to which the assignees of the insolvent, as well as various attaching creditors, set up a title, he may bring a bill of interpleader to adjust their conflicting claims. The Court in

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[1] In a case before Lord Eldon, it was objected, that one of the defendants was out of the jurisdiction, and therefore, that a bill of interpleader could not be supported; his lordship, however, declared that such a proposition could not be maintained, as a person out of the jurisdiction, might threaten and bring an action; that the plaintiff in a bill of interpleader, against persons within and without the jurisdiction, is bound to bring them all within the jurisdiction, in a reasonable time; if he does not, the consequence is, that the only person within the jurisdiction, must have that which is represented to be the subject of competition, and the plaintiff must be indemnified, against those who are out of the jurisdiction, when they think proper to come within it, and sue, either at law, or in this Court. If the plaintiff can show that he has used all due dilligence to bring persons out of the jurisdiction, to contend with those who are within it, and they will not come, the Court upon that default, and their so abstaining from giving him the opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good service, and enjoin that action for ever; not permitting those who refused the plaintiff that justice to commit the injustice against him. 2 Vesey and Beam., 411. So, also, it has been held, that where one of the defendants is out of the jurisdiction, or allows the bill to be taken as confessed by him, the plaintiff is entitled to the decree of interpleader, and a reference will be directed, if the facts for a decree are not made out by the other defendant. Daniel's Reports, 64.

such case, to prevent the abuse of its jurisdiction, requires the plaintiff to make an affidavit, that there is no collusion between him, and any of the parties; and where money is due from him, he must offer in his bill, to bring it into Court.[1] By a bill of interpleader, the parties are put upon proving their contested facts, and the Court may, in its discretion, direct an issue or reference to a master, or an interpleader.

2. When may a tenant bring a bill of interpleader?

When several persons claim the rent, in privity of contract, or tenure, as in the case of mortgager and mortgagee, trustee and cestui que trust, the assignee, and representatives of the lessor. The tenant cannot dispute the title of his landlord;[2] he may affirm it, and put himself upon the uncertainty of the person, to whom the rent is due. But where a stranger claims the rent, under a title paramount, there being no privity between him, and the tenant, an interpleader does not lie.

3. Can a person, who is in the possession of property, as the agent or consignee of another, bring a bill of interpleader, where it is claimed by a third person, under an independent title?[3]

He cannot. An agent is not permitted to dispute the title of his principal, to property which he has received from him, or for him. An exception to this general rule, is said to exist, in the case of public agents, founded on the policy of protecting them, when in the discharge of their duty, from the burthen of suits, in which they have no interest, and have undertaken no private

[1] 7th Dana, 410.

[2] This general rule has exceptions; for instance, when the landlord has, by his own act, given a colour of title to another, subsequently to the lease, and thereby entangled the tenant in embarrassments, which a bill of interpleader, may be the most proper mode of quieting. Hoveden on Frauds, vol. 1, page 220. So, where a landlord has induced a tenant to accept a lease by fraud, force, or illegal behaviour. 6th Binney, 45.

[3] Where an auctioneer had received a deposit on a sale, and gave a receipt expressing that the deposit, under no circumstances, would be paid over to either buyer or seller, without their mutual consent and the production of the receipt, and a difficulty arose, as to the title, and one of the parties sued the auctioneer at law, it was held that a bill of interpleader would lie; 2 Edw. Rep., 648.

trust. Where the bailor of property is a mere tortious possessor, and the rightful owner demands it of the bailee, a bill of interpleader will not lie, for there is no privity of contract, and the bailee would be deemed a wrongful possessor, if after notice he should withhold the property from the true owner.

4. Will a bill of interpleader lie, on behalf of a sheriff, who has seized goods on execution, to which adverse claims are set up?[1]

It will not; for as to one of the defendants, he must admit himself a wrong doer.

5. What is a bill in the nature of a bill of interpleader?

It is a bill, brought by a party in interest, to ascertain and establish his own rights, where there are conflicting claims of third persons; as, for example, where a mortgager wishes to redeem the mortgaged estate, and different persons claim the mortgage money.

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[1] 1 Iredell's E. R., 229; 2 Ire., 48; 8th Paige, 339.

CHAPTER XXI.

BILLS QUIA TIMET.

1. NATURE AND EXTENT OF THE JURISDICTION ON BILLS QUIA TIMET.
2. CASES IN WHICH A RECEIVER WILL BE APPOINTED.
3. RIGHTS AND DUTIES OF A RECEIVER.
4. WHEN SECURITY, OR THE PAYMENT OF MONEY INTO COURT, WILL BE REQUIRED.

1. What is the nature and extent of the jurisdiction on bills *quia timet*?

Courts of Equity, to prevent irreparable mischief and accomplish the ends of justice, exercise a precautionary jurisdiction of a most extensive and salutary character. Where a party has reason to apprehend future injury to his rights or interests, he may, on application to a Court of Equity, by a bill *quia timet*, obtain such assistance as the peculiar circumstances of his case require. This most usually consists in issuing an injunction; in directing a security to be given, or money to be brought into Court; or in the appointment of a receiver. These are only examples of the *mode*, in which the Court will exercise its remedial functions. The jurisdiction is co-extensive with the capacity to render a decree, which will afford the relief and protection that is desired. Thus, where a surety is afraid of loss from the delay of a creditor, to collect a debt which has become due, he may file a bill, *quia timet*, and compel his debtor to discharge the obligation. Upon the same principle, the spe-

cific performance of a general covenant of indemnity will be decreed, although it sounds in damages only.

2. When will a Court of Equity appoint a receiver ?[1]

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[1] Vide, Barbour's Chancery Practice, from which a portion of the text and the following note, has been extracted, and 1 Johns. C. Rep., 57, 60; 2 J. C. R., 48; 4 J. C. R., 388; 2 Paige, 343; 4 Paige, 577; 8 Paige, 152, 388, 475; 1 McCord's Chy. Rep., 254; 1 Hop., 429; 1 Freem., 493, 718; 1 Bland., 213; 2 Conn., 396; 1 Hill's Chy. Rep., 150; 1 Hoffm., 524.

The appointment of a receiver, and the order to bring money into Court, are interlocutory proceedings, which will be found more fully considered in books of practice. There are a few points which may be properly introduced in this connection.

1. *Who will be appointed a receiver.* Neither a solicitor in the cause nor a trustee are eligible to the office of receiver, on account of their privity with the matter in dispute. The Court looks to the trustee to examine with an adverse eye, whether the receiver does his duty.

2. *What is a sufficient cause for the appointment of a receiver.* The plaintiff must show first, either that he has a clear right to the property itself; or that he has some lien upon it; or that the property constitutes a special fund, to which he may resort for the satisfaction of his claim. And, secondly, that the possession of the property by the defendant, was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant. Freeman's Ch. Rep., 718.

3. *Ordinary cases in which a receiver is appointed.*

1. Where a bill charges an executor or other trustee with a breach of trust. This has been sufficiently considered in the text.

2. On creditors' suits, as where a debtor in failing circumstances assigns his property to a person who is insolvent, in trust for his creditors, a receiver will be appointed on the application of such creditors, to take charge of the property assigned. So, upon a bill filed by a creditor for the purpose of reaching the property of the defendant, after the return of an execution at law unsatisfied, a receiver of the defendant's property will be appointed, if the equity of the bill is not denied upon the hearing of the application.

3. *In mortgage cases.* Thus, the complainant in a foreclosure suit is entitled to a receiver of the rents and profits of the mortgaged premises pending the suit, where the premises will not, upon a sale thereof, under the decree, bring sufficient to pay the debt and costs; and where the party who is personally liable for the mortgage debt, is irresponsible. But a receiver will not be appointed if the mortgage is impeached

A receiver is a person appointed by the Court to receive the rents and profits of the land, or other property pending a suit, when it does not appear reasonable that either party should do it. The appointment is a matter resting in the sound discretion of the Court, and will be made, not for the benefit of the party making the application alone, but of all other persons concerned. The immediate moving cause of the appointment, is the preservation of the subject of litigation, or the rents and profits from waste, loss, or destruction. To authorise the appointment, the bill must state facts which show its necessity and propriety. It may be granted in any case of equitable property, upon suitable circumstances. In cases of elegit, and conflicting legal and equitable charges upon an estate, it is the common course to appoint a receiver for the benefit of all concerned. The Court will not, however, disturb the legal rights or equitable priorities of the parties. The appointment of a receiver in these cases has been called an equitable execution. The Court of Chancery, however, does not willingly listen to an application for the appointment of a receiver of an estate, where the defendant is in possession under a legal title. It will only be granted in cases of fraud, clearly proven, or of imminent dan-

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or questioned. Nor will one be appointed against a mortgagee in possession, who swears that he has not been paid his debt, nor realised from the rents any thing like the amount for which he holds the premises as security.

4. *In partnership cases.* The principle upon which a Court of Equity interferes between partners, by appointing a receiver, is merely with a view to the relief, by winding up and disposing of the concern and dividing the produce, not to carry it on. Therefore, as a general rule, a receiver will not be appointed of a subsisting and continuing partnership, unless it satisfactorily appears, that the complainant will be entitled to have the partnership dissolved at the hearing. A case must be shown of the grossest abuse and strongest misconduct on the part of the managing partner. But upon a bill filed by one of the partners, to close up a partnership concern, it is a matter of course to appoint a receiver, if the partners cannot agree among themselves, as to the disposition and control of the property. So it is, where either party has a right to dissolve the partnership, and the articles do not provide for the settlement of the concern. Vide, Story on Partnership; Barbour's Chancery Practice.

ger, if the immediate possession should not be taken under the care of the Court. For example, the Court will not, on a bill filed by a legatee, or *cestui que trust*, against an executor or trustee, take away from the defendants a fund to which they are rightfully entitled, unless it is established, that there has been gross fraud, or breach of trust, or that there is a reason to apprehend a loss of the fund, from some circumstance beyond the mere poverty of the party in possession. So, where the first of several incumbrancers is in possession, the Court will not oust him, or deprive him of the enjoyment of the rents and profits, unless sufficient cause is shown.

3. What are the rights and duties of a receiver ?[1]

A receiver, as has been before stated, is an officer of the Court, to whom he must apply, from time to time, to do such acts as may be beneficial to the estate. He is considered as truly and properly the hand of the Court. But his appointment does not involve the determination of any right, or affect the title of either party, in any manner whatever; not even so as to prevent the running of the Statute of Limitation. By virtue of his appointment, he is entitled to the possession of the premises, but he can neither bring or defend a suit, rent the estate, or expend money without special leave. The Court regarding the possession of the re-

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[1] The receiver, as an officer of the Court, is responsible as such for good faith and reasonable diligence. When the property is lost or injured by any negligence or dishonest execution of the trust, he is liable in damages; but he is not as of course responsible, because there has been an embezzlement or theft. He is bound to such ordinary diligence as belongs to a prudent and honest discharge of his duties, and such as is required of all persons who receive compensation for their services. Story on Bailments, 620, 621, and cases there cited. In Salway *vs.* Salway, 2 Russ. and M., Lord Brougham held, (overruling the decision of Sir John Leach, 4 Russ., 60,) that a receiver appointed by the Court is answerable for the loss of money consequent on the failure of a banker, with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control of the fund. This judgment was afterwards affirmed in the House of Lords, 9 Bligh., 181. The Lord Chancellor says, "That if a receiver puts a fund out of his own control, so that other persons shall be able to deal with it, he guarantees the solvency of those persons, and becomes answerable for any loss which may ensue."

ceiver as its own, will not suffer him to be molested, even by an action of ejectment, on an adverse title. Where a person in possession claims a right to retain it, the receiver must either proceed in the ordinary way to establish his superior title, or the plaintiff in Equity must make such third person a party to the suit, so that an order may be made for the delivery of the property, which, if not obeyed, can be enforced by process of contempt.

4. When will the giving of security, or the payment of money into Court, be required, on bills *quia timet?*

The Court will more readily listen to an application to make these orders, than to appoint a receiver, because in its contemplation they are very unlikely to be attended with inconvenience or loss to the persons interested. Where the party in possession of the fund is an executor or trustee, it is not even necessary to prove that there is any danger of the property being wasted; as, for example, on a creditor's bill for the administration of an estate. Where the right of enjoyment is future or contingent, as in the case of a legacy, whether pecuniary or specific, bequeathed to A, for life, and on his death to B, the latter, on showing any reason to apprehend the loss or deterioration of the property, from its remaining in the hands of the party entitled to its immediate possession, may obtain an order, either that the fund be brought into Court, or that security be given for its preservation and future delivery.[1] The person making the application must, however, be solely entitled, or have such a joint interest with others, as to entitle him, on their behalf and his own, to have the fund secured.

[1] Vide, ante, page 100.

CHAPTER XXII.

BILLS OF PEACE.

1. WHAT IS A BILL OF PEACE, AND WHEN IT WILL LIE.

1. What is meant by a Bill of Peace, and when does it lie?

Bills of Peace are of two kinds. The object of one, is to ascertain and establish a right, which is claimed as a general legal right, by distinct persons, and the foundation of the jurisdiction is to prevent a multiplicity of suits. For example, where a man has possession, and claims a right of fishery in a river, for some distance along its banks, and the various proprietors set up adverse claims, he may bring a Bill of Peace against them all, to establish his right, and quiet the possession. So, it will lie, to establish a duty, claimed by a municipal corporation, against a number of persons, although there is no privity between them. Where the right is disputed, between two persons only, there is no foundation for the jurisdiction, and the bill cannot be maintained. The jurisdiction, however, on principles of public policy, will not be so extended, as to intercept the assertion of public rights. The other class of cases, to which this remedial process is applied, is, where a right has been satisfactori-

ly established at law, and litigation is about to be renewed again: under such circumstances, a Court of Equity acting upon the maxim "*Interest reipublicæ ut sit finis litium*," will interfere, and grant a perpetual injunction, to quiet the possession of the plaintiff, and suppress future litigation of the right.

CHAPTER XXIII.

INJUNCTIONS.

1. NATURE OF INJUNCTIONS, AND GENERAL PRINCIPLES BY WHICH THEY ARE REGULATED.
2. WHEN AN INJUNCTION WILL BE GRANTED TO STAY PROCEEDINGS AT LAW.
3. WHEN COURTS OF EQUITY WILL REFUSE TO STAY PROCEEDINGS AT LAW.
4. WHEN COURTS OF EQUITY WILL ABATE A PUBLIC NUISANCE.
5. WHEN COURTS OF EQUITY WILL RESTRAIN ACTS INJURIOUS TO REAL PROPERTY.
6. WHEN COURTS OF EQUITY WILL INJOIN ACTS INJURIOUS TO PERSONAL PROPERTY.
7. WHEN COURTS OF EQUITY WILL RESTRAIN A PARTY FROM THE COMMISSION OF ILLEGAL ACTS.

1. What is a writ of injunction, and what are the general principles which regulate this branch of equitable jurisdiction?[1]

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[1] The writ of injunction is the great remedial process by which Courts of Equity protect and enforce equitable rights, and there is no title in jurisprudence, in which it may not be beneficially applied. The matter contained in this chapter can only illustrate the general principles on which it is granted, as new cases are constantly arising, to which it is extended. Indeed, the process of injunction may be used in every possible case, where it will assist the Court in the exercise of its jurisdiction. 2 Paige, 317.

An injunction is a writ framed according to the circumstances of the case, commanding an act which the Court regards essential to justice, or restraining an act which it esteems contrary to equity and good conscience. The use of this writ may be said to be commensurate with the jurisdiction of the Court. It is the principal instrument of that administrative and protective jurisprudence which constitutes the marked characteristic of the Chancery system. The writ commanding an act to be done, is called the Judicial Writ, because it issues subsequent to a decree, and is in the nature of an execution to enforce the same. It is a direction to the defendant, to yield up, or to quiet, or to continue the possession of the land, or other property, which constitutes the subject matter of the decree in favor of the other party.[1] The Remedial Writ of injunction, is in the nature of a prohibition; but it is addressed, not to an inferior Court, but to the party, and is intended to restrain him from the exercise of some right, real or supposed. The latter class of injunctions, only, will be considered in this place; and they are either temporary, when granted for a time, or until the coming in of the answer, or the hearing of the cause, or perpetual, as when they form a part of the decree, after a hearing upon the merits; and the defendant is perpetually inhibited from the assertion of

[1] The Judicial Writ of injunction, for the delivery of the possession of land, it is believed, has become obsolete in this country. The proper mode of enforcing a decree was examined by Chancellor Kent, in Kershaw *vs.* Thompson, 4 Johns., 609. He held, that the power of the Court to apply a remedy, was co-extensive with its jurisdiction over the subject matter, and, after reviewing the authorities, decided, that where the object of a decree was to procure the possession of lands, the proper course of proceeding was, first, to serve an order on the defendant for the delivery of possession; upon disobedience to that order, an attachment and injunction, and if the injunction was ineffectual, then a writ of assistance. This case was subsequently considered in 1 Hopk., 423, and it was held, that the circuity of proceeding, there pointed out, was unnecessary, and that the most simple and efficacious means for the delivery of possession, should be adopted; that there was no sufficient reason for the expense and delay of the order and the injunction, and, therefore, the writ of assistance was to be considered as the only necessary process for giving possession of land, which has been the subject of adjudication.

some particular right. So, they may be dissolved, revived, continued, or extended, according to the exigencies of the case. An injunction will not be granted under the prayer for general relief. It must be specifically demanded; because, as it is said, the defendant might then make a different case in his answer, from what he would have done against the general words of the bill. This branch of jurisdiction, rests in the sound discretion of the Court, and as it was only established to promote the purposes of justice, it will not be exercised under circumstances, or in a manner to operate oppressively or inequitably. For example, where a party has misled others, by gross laches in the assertion of his rights, a Court of Equity will not assist him in enforcing them against the persons thus deluded. As it is impossible to foresee the exigencies of society, which may require their aid, Courts of Equity have wisely refrained from limiting their power, to grant special injunctions by any fixed rules. But, as this power is capable of being made an instrument of inflicting irreparable injury, it is to be exercised with great caution, and only in cases, where it is clearly indispensable to the ends of justice.

2. When, and on what grounds, will Courts of Equity restrain proceedings at law, by injunction ?[1]

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[1] There are some other points connected with this jurisdiction which it may be well to note here. A Court of Equity will enjoin a sale of real estate on execution, where no valid title would pass, and where the sale would involve the title of the complainant in suspicion. 2 Ohio, 470; 5 Ohio, 178. So, an injunction may be allowed to restrain the sale of city lots, under an illegal assessment for taxes, on the ground that it casts a cloud over the title of the true owner, which diminishes the value of his property. 3 Ohio, 72. In 5 Paige, 501, Chancellor Walworth says: "The jurisdiction to set aside deeds, and other instruments which are a cloud upon the title to real estate, and to order them to be delivered up and cancelled, is now fully established. (See 4 Mon. Rep., 280; 1 Johns. Chy. Rep., 518; 2 Paige, 482.) If the Court of Chancery has jurisdiction to set aside a deed, made on a sheriff's sale on this ground, it seems to follow, as a necessary consequence, that it may interpose to prevent such a shade from being cast on the title, by injoining the sale." The same principle is affirmed in 3 How. S. C. R., 463. And in 6 Paige, 262, it was held, that a Court of Chancery may interfere by injunction, to restrain the defendant from proceeding in an illegal act,

The peculiar nature of legal proceedings, and the distribution of rights and remedies, between distinct tribunals, which prevails in English jurisprudence, render the exercise of this function essential to the completeness of the system of remedial justice. The Court of Equity does not in this way deny the

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which will necessarily cast a cloud upon the complainant's title to real estate, and will naturally diminish its value. The decision of the Court of Appeals, 3 Leigh., R. 1, is inconsistent with the doctrine which is to be derived from the foregoing cases. Hart, the rector of the parish of Henrico, being in the possession of the glebe land of the parish, and setting up a legal title to it, applied for an injunction, to inhibit the overseers of the poor from selling the same, under the provisions of the statute of 1802, for the resumption of glebe lands. The injunction was refused on the ground, that the remedy of the plaintiff at law was complete. But there is a great difference between real and personal property.

As a general rule, when the sheriff levies on the goods of A, for the debt of B, A's remedy is at law. He may proceed either against the creditor in an action for money had and received, against the sheriff in an action for trespass, or against the debtor for a recovery of the specific property. There is an exception to this rule, which is generally recognised in the southern states of our Union, in respect to slave property, on the grounds expressed in the following opinion of Judge Catron. "If the slaves of A be levied on for the debt of B, and A can show a clear right of property to the slaves, Courts of Equity have jurisdiction to restrain the creditor and sheriff, until the right be tried at law, or determined in Equity, if the right be undoubted in the mind of the Court. The slaves constitute a part of the family, entitled to and receiving, if they be worthy, the affections of the master to a great extent. This disposition towards this unfortunate class of people, it is the policy of the country to encourage and promote. The slave and the master should never be separated, when affection exists between them. In the next place, it must often occur, if the sheriff be permitted to sell, that the mother will be separated from the children, or the husband from the wife. Nothing can be more abhorrent to these poor people, or to the feelings of every benevolent individual, than to see a large family of slaves sold at sheriff's sale; the infant children, father, and mother, to different bidders. To treat them as domestic animals, would be to declare that as a people, we had, in reference to this class, sunk all feelings of humanity, and that the slave was not elevated in his sensibilities above the brute. As a fact and a theory, this is untrue." 4 Yerger, 92; 6 Rand., 507. The same principles are applicable to any other case, where the specific chattel possesses some intrinsic and peculiar value, for which no compensation can be rendered in damages.

jurisdiction of the Court, in which the proceedings have been had, that it seeks to arrest.[1] The writ of injunction is addressed, not to the Court, but to the parties, and is granted on the sole ground, that from certain equitable circumstances, it is against conscience for the party inhibited to proceed in the cause. Its object is to prevent an unfair use being made of the process of a Court of Law, in order to deprive another of his just rights. The writ may be granted at any stage of the proceedings, and whether they are prosecuted in a foreign or domestic forum. The first and most common class of injunctions to stay proceedings at law, is, where the rights of the party are equitable, and, therefore, incapable of assertion in that Court; as, for example, where a trustee, in violation of his trust, seeks to deprive his *cestui que trust* of an estate, to the beneficial enjoyment of which he is entitled, or where a party sets up a satisfied term or an outstanding legal incumbrance, to defeat the possession of another, having a better conscientious and equitable title; or where a bond or mortgage secured by a penalty is forfeited, and the party can obtain no relief at law. So, where a surety or executor has been discharged in Equity, although they continue responsible at law, as where, in the one case, an arrangement has been made between the principal and debtor, inconsistent with the rights of the surety, and, in the other, when the assets of the estate have been lost by unavoidable casualty. So, where a party has a set off in Equity, which would not be recognised as such at law. The second class of cases are those

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[1] "In Hoyt *vs.* Gelston, (13 Johns., 139) the Court say, 'that as a general rule, they will notice an operative injunction for the purpose of promoting the ends of justice, and preserving harmony between the Courts.' With the greatest deference, however, I should think any notice which we can take of an injunction, as influencing our own practice in the cause to which it relates, would rather constitute an exception than a general rule. We should, of course, allow it, under circumstances, as an excuse for delay or for omitting some step in the cause; and so save the party injoined from the effect of forbearing to sue out execution, from a default or judgment of *non pros*, or judgment as in case of non-suit, &c. But we cannot receive it as rendering proceedings irregular, because contrary to it." J. Cowen, in 1 Hill, 651; same principle, 4 Hill, 268.

where, from circumstances of which a Court of Law cannot take cognizance, its forms would be abused or perverted to the purposes of injustice; as where a party is unable to defend himself at law until he obtains a discovery of certain facts from his adversary, or where he has been prevented from making his defence by fraud, accident, or mistake;[1] or where after judgment, a debt has been paid, but an execution has nevertheless issued.[2] So, where a suit has been brought in Equity, and the party institutes proceedings subsequently for the same subject matter at law, if the cause in Equity has proceeded to a decree, the Court will interfere by injunction, and restrain the prosecution of the second suit, even if it is in a foreign country; and as it is a

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[1] A bill of injunction will lie to restrain proceedings on a decree obtained by surprise; 9 Leigh., 114. So, it has been decided in Kentucky, that a Circuit Court may, by injunction, prevent the enforcement of a mandate of the Court of Appeals, which has been obtained by fraud, surprise, or in violation of an agreement. 6 Dana, 385. Courts of Equity, however, manifest an increasing reluctance to interfere with judgments at law, where the complainant, by proper diligence, might have availed himself of his defence in that Court. But in cases of fraud, accident unmixed with negligence, or unqualified surprise, they will afford relief, for on such grounds Courts of Law would grant a new trial. In 1 Sumn. C. C. R.. 89, when the declaration was so amended at the trial, as to let in a new claim, and the defendants were foreigners, who had a good defence at law unknown to their counsel, it was held, that a Court of Equity might, on due proof, give them the benefit of such a defence, and grant an injunction, *pro tanto*, to the judgment at law. It is a case falling within the doctrine laid down in 7 Cranch, 332, that a Court of Chancery will interpose where any fact is shown, proving it to be against conscience to execute a judgment, and of which the injured party could not avail himself, in a Court of Law, or of which he could have availed himself, but was prevented by fraud, or accident unmixed with any fault or negligence in himself or his agents.

[2] An injunction will not be granted to stay a sale under an execution, on the ground that the judgment has been fully paid and satisfied; for the party has a prompt and adequate remedy at law. 1 J. C. R., 49. In 3 Leigh., 85, however, it was held, that though a party, under the circumstances stated above, had a remedy at law, yet an injunction would be granted for his relief, because the legal remedy was not as safe and convenient as that of Equity.

gross oppression to molest another with a double suit for the same cause of action, the party will be compelled, in all cases, to elect in which Court he will proceed, and to abandon the other suit.[1] The third class of cases in which a Court of Equity will stay proceedings at law, are those in which that course is necessary to maintain its own jurisdiction; as, for example, where after a decree on a creditor's bill for the administration of assets, a suit is brought by one creditor against the executor at law. The Court, in that case, will not permit the funds to be thus withdrawn from its control, and the equitable adjustment of the estate disturbed. So, the Court will protect its officers from responsibility for acts done under, or in virtue of its processes.[2] In the fourth place, Courts of Equity will restrain

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[1] There is an exception to this, rule in the case of a mortgage. The mortgagee may exercise all his rights at the same time, and pursue his remedy in Equity upon the mortgage, and his remedy at law upon the bond or covenant concurrently. Indeed, it is the better opinion, that after a foreclosure, with or without a subsequent sale, the mortgagee may sue at law for the deficiency to be ascertained in the case, by the proceeds of the sale, and in the other, by an estimate and proof of the real value of the pledge, at the time of the foreclosure. Vide, Kent's Comm., 4th vol., 182; 8 Vesey, 527; Sumner's edition, note and references of the editor.

[2] The practical importance of the subject, as well as the intrinsic merit of the following opinion, delivered by Lord Brougham, in the case of Aston *vs.* Heron, may justify its insertion. After saying that it was too late to inquire whether the jurisdiction referred to in the text, was properly exclusive, he goes on to remark, that wherever the title of its officers, whether receivers or committees, is disputed, the Court has no choice; it cannot allow any proceedings to go on against them, without abandoning its own jurisdiction; it must restrain as of course, otherwise it permits its own orders to be rescinded, and its jurisdiction to be questioned. But where the process has been irregularly, that is, illegally used, no considerations, either of principles or of practical convenience, can require that the Court should, in every case, draw to itself the examination of the matter, prevent all other tribunals from punishing the wrong-doer, and exclude the injured party from all redress, save that which its own jurisdiction can afford. Take the case, for example, of other Courts of high jurisdiction. If the process of the King's Bench has been abused, false imprisonment will lie before the Common Pleas,

proceedings at law, when they tend to vexatious and oppressive litigation. Some of the cases in which this jurisdiction will be exercised, have been already considered in the chapter on Bills of Peace. On kindred principles, a party who has been guilty of repeated breaches of his covenant, will be enjoined from any farther violation. So, where a defendant has been discharged

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or Exchequer, although neither of these Courts could directly examine an order made by the King's Bench; nor will the latter Court stop, indeed it has no power to stop, an action thus brought upon the ground that the irregularity was in executing its process, that no other Court can judge of what is or is not a breach of its rules, and that it alone can give redress for the injuries committed in its name. The High Court of Parliament, endowed with loftier functions, lays claim to more ample privileges; the rather because these have never with absolute precision been ascertained. Where, therefore, anything has been done in execution of their orders, the Commons have been frequently in the habit of refusing to allow the matter to come in question before any other tribunal. But they have never held it obligatory upon them, in all cases, to be the sole judges of the due execution of their own process. Nor have they deemed it any abandonment of their rights, or degradation of their state, to permit the conduct of persons executing their orders, nay, to allow the extent of their privileges themselves, to become incidentally the subject of examination in Courts of a subordinate jurisdiction. The same assembly, which, in the reign of Queen Ann, committed to prison the counsel who argued a writ of error on a record touching a right of contested election, and which half a century later went to the preposterous extremity, (I speak it with due reverence) of trying, or rather violently asserting, a right of fishing, claimed by a member, through the medium of committing those who disputed it to the custody of the sergeant-at-arms, will not easily be suspected of too little tenacity in holding by its privileges, or too scrupulous a reluctance in sustaining its dignity; and yet that same body allowed all the Courts of Westminster Hall to question its right of commitment a few years ago; and I myself, albeit then a member, was suffered, and with impunity, to argue against that right before the other house of Parliament, and to treat the power assumed by the Commons as an illegal usurpation. Enough, assuredly, has been said to prove that the Court of Chancery, though clothed with the undoubted right of preventing any other tribunal from examining questions arising out of the execution of its orders, is not bound upon any principle to exclude such concurreut jurisdiction in every case, whatever be the circumstances that may have attended it. The true principle seems to be, that where the jurisdiction is disputed, the Court has no choice, but must at all events, and at once draw the whole matter over

from a contract by a foreign tribunal, Courts of Equity will not suffer him to be again molested, and exposed to the hazard and embarrassment of establishing a plea of *res judicata*.

3. In what cases will Courts of Equity refuse to stay proceedings at law?[1]

First, a Court of Equity will not interfere to stay proceedings of a criminal nature, except where it can be done as incidental to the ordinary power to impose terms upon parties, who seek its aid in furtherance of their rights.[2] Second, a Court of Equity will not stay proceedings at law upon a defence, of which a party by proper diligence might have availed himself in that Court; and this doctrine is even extended to cases where a party has neglected to assert a claim, or matter of defence in a foreign

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to its own cognizance; but where, admitting the Court's authority, redress is only sought for irregularity or excess in the performance of its orders, and, generally speaking, wherever the jurisdiction is not denied or resisted, the Court has an indisputable right to assume the exclusive jurisdiction, but may, if it thinks fit, on the circumstances being specially brought before it, permit other Courts to proceed for punishment or redress. 2 Mylne and Keen, 390.

The right of a Court of Chancery, in its discretion, to restrain third persons from instituting proceedings at law against its officers, acting under its direction, although the persons by whom such proceedings are instituted are not parties to the suit in that Court, is recognised in 5 Paige, 131; 8 Paige, 388; 9 Paige, 437. It may be questioned whether this doctrine, in all its latitude, is consistent with the spirit of our institutions, or would be generally adopted in our country. Even Lord Eldon, in a case which came before him, (1 Jac. and Wal., 655,) manifested the utmost reluctance to break in upon the common law right of the subject, to ask of a jury how far he was entitled to damages, for being deprived of his liberty. How much stronger would be the reluctance in a community, who, in the strong language of Judge Roane, "are not disposed to yield every thing to that encroaching jurisdiction, which knows not the inestimable trial by jury, and is blind to the incalculable superiority of *viva voce* testimony."

[1] A creditor at large, or before judgment, is not entitled to the interference of a Court of Equity, by injunction, to prevent the debtor from disposing of his property in fraud of such creditor. 2J. C., 144; 2 Leigh, 84.

[2] An injunction to restrain the execution of a sentence for crime, may be treated as a nullity. 4 Hill's N. Y. R., 581.

Court, when he had an opportunity of doing so. But relief will be granted, where the defence could not at the time, or under the circumstances, be made available at law, without any laches of the party. On the same principle, a party cannot injoin a judgment which has been obtained in consequence of mistake in pleading, or in the management of his cause. Third, a Court of Equity will not stay proceedings at law, for a defect of jurisdiction in the Court where they are pending, nor because it has decided a question of law erroneously. Fourth, under the Constitution of the United States, the Federal Courts have no power to injoin proceedings in the State Courts, nor the latter in the former Courts. And the same doctrine, it has been recently decided, prevails between the Courts of the different States of the Union.

4. Will Courts of Equity interfere, to abate or prevent a public nuisance ?[1]

In England, upon an information by the Attorney General, a Court of Equity will interfere, by injunction, to prevent a public nuisance; unless the thing sought to be prohibited, is, in itself, and unavoidably, a nuisance, an injunction will not be granted, until its character as a nuisance, is established, by clear and satisfactory evidence. So, a Court of Equity will interpose on behalf of private individuals, when the common injury disturbs them in the enjoyment of their private rights.

5. When will Courts of Equity interfere, by injunction, to protect rights, connected with real property ?

First, Courts of Equity will restrain the vexatious alienations of real property, *pendente lite;* for although the right of the true owner will not be affected by such conveyance, yet his title may be so embarrassed, by the transfer, as to render it ne-

[1] In the Attorney General against the Utica Insurance Company, Chancellor Kent expressed a doubt, whether Courts of Equity have jurisdiction to interfere at all, and especially by injunction, in cases of *public* nuisances, by which the enjoyment of private right is not violated. 2 J. C. R., 379. But it is now settled, that a Court of Equity may take jurisdiction in cases of public nuisance, by an information filed by the Attorney General; 12 Peter's, 98, City of Georgetown, *vs.* Alexandrian Canal Co.; Crowder *vs.* Tinkler, 19 Vesy., 616. This jurisdiction seems to have been acted on with much caution and delicacy. Ib.

cessary, to make the purchaser a party to the suit, or after its termination, to institute new proceedings against him, to compel a surrender of his title. Second, Courts of Equity will restrain the commission of waste, both on the application of persons, who have only a limited interest in the property, and of those whose titles are purely equitable.[1] Thus, in the case of mortgages, if the mortgager or mortgagee in possession, commits waste, or threatens to do it, although there is no remedy at law, an injunction will be granted. It will not interfere between joint-tenants, coparceners, and tenants in common, who have a right to enjoy the estate as they please; except in some special cases, as where the waste is destructive of the estate, or where the party committing it, is insolvent. So, there are many acts not esteemed waste at law, which a Court of Equity, on account of their manifest injury to the inheritance, will restrain, and which have, hence, been termed equitable waste; such as wanton injury to the buildings, or the cutting down trees planted for the ornament or shelter of the premises. The interference of Equity was, at one time, confined to cases founded in privity of title, but the jurisdiction has been insensibly enlarged, so as to embrace adverse claims.[2] The remedy by bill in Equity, is

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[1] Chancery goes to greater lengths than the Courts of Law, in staying waste. It is a wholesome jurisdiction to be liberally exercised in the *prevention* of irreparable injury, and depends on much latitude of discretion in the Court; 2 J. C. R., 19.

[2] The rule seems to be yet unsettled, as is shown by the following cases. An injunction will not be granted to restrain waste, unless the title is clear and undisputed; 4 J. C. R., 21; 6 Vesey, 51; 1 Hop., 342. The party who asks an injunction against waste, or acts in the nature of waste, must set forth and verify an express and positive title, legal or equitable, to the estate on which the waste is threatened; 1 Vesey, 401; 19 Vesey, Jr., 160. An injunction will not lie, to stay waste, when the defendant is in possession, by an adverse title; Walker's Reports, 177; 1 V. E. Howard, 112. But in 2 Desaus., 616, a different doctrine was held, where the defendant in possession of land, which he claimed by an adverse title, and concerning which, a suit at law was pending, was restrained, by injunction, from cutting timber, and committing other waste. So, in Maryland, an injunction may be granted, to stay waste, pending an action at law, or a suit in Chancery, to try the right; 1 Bland., 570.

more easy, expeditious, and complete, than by action at law. A discovery may be obtained; an account decreed, and compensation given for past waste; and future waste prevented. Third, Courts of Equity will interfere, by injunction, to restrain or, abate a private nuisance, where it would lead to a multiplicity of suits, or be productive of irreparable mischief.[1] The injury must be such, as not to be susceptible of adequate compensation in damages, or to be likely, from its permanent nature, to occasion a constantly recurring grievance. Thus, for example, where one man builds so near the house of another, as to darken his windows, against the clear rights of the latter, either by contract, or ancient possession, a Court of Equity will interfere, either to prevent the nuisance, or to remedy it, if already done; because an action at law for damages, would not furnish adequate relief. Of a similar nature, are cases of obstruction to water courses, diversion of streams from mills, the erection of a new ferry so contiguous to an old one as to injure it, the threatened destruction of property by railroad or other incorporated companies,[2] and the invasion of statute privileges, or franchises, connected with the enjoyment of real estate.[3] On the same principle, relief will be extended in cases of trespass, where they have been so long continued, as to amount to a nuisance, or where they might produce irreparable damage.[4] On this ground

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[1] The Court of Chancery will not interfere, to prevent or remove a private nuisance, unless it is a case of strong and imperious necessity, or the right previously established at law; 6 J. C. R., 439; 12th Oh. 387.

[2] The various American cases, in which the sanctity of private property has been vindicated against the abuses of the right of *eminent domain*, are collected and examined in the note to Kent, Comm., 2 vol., page 329.

[3] The jurisdiction of Chancery to secure the enjoyment of privileges conferred by statute, is well established, both in England and America. The student will find an interesting and well written review of the cases on this subject, in the American Law Magazine, Vol. 4, page 350.

[4] Chancellor Kent says, in Jerome *vs.* Ross, 7 J. C. R., 333: "I do not think it advisable, upon any principle of policy or justice, to introduce the remedy of a bill in Chancery, as a substitute for the action of trespass at law, except in strong and aggravated instances, where the

an injunction will be granted, in all cases of timber, coals, ores, and quarries, when the party is a mere trespasser; or where he exceeds the limited rights with which he is clothed.

5. When will Courts of Equity grant an injunction against acts, injurious to the rights of personal property?

First, Courts of Equity will, under some circumstances, restrain the alienation of personal property. The loss of personal property, is supposed to admit, ordinarily, of full compensation in damages, but, wherever the ends of justice require it, Courts of Equity, if invoked, will exercise their preventive powers; as where the chattle possess a peculiar value in the eye of its owner, or where the tortious vendor is insolvent. So, a Court of Equity will restrain the transfer of a negotiable instrument, which was given for an illegal consideration, or where, from any other reason, the holder is not entitled to negotiate it, because the plaintiff might be able to make no defence against it, in the hands of a bona fide holder. So, an injunction has been granted, to prevent the transfer of stock *pendenta lite*. This jurisdiction is extensively and beneficially exercised in the case of partners, who are about, unjustly and fraudulently, to make or circulate notes, in the name of the firm. On the same princi-

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trespass goes to the destruction of the inheritance, and where the mischief is remediless. This was the opinion and doctrine, which I had occasion to declare, in Stevens *vs.* Beckman, (J. C. R., 318.) It appears to be the English doctrine, and the practice of this Court, has been in conformity to it. I do not know a case, in which an injunction has been granted to restrain a trespasser, *merely because he was a trespasser*, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. In ordinary cases, the damages to be assessed by a jury, will be adequate for a check and for a recompense. Every man is, undoubtedly, entitled to be protected in the enjoyment of his property, though it may be of no intrinsic value. He may have on his land, a large mound of useless stone or sand, which he may not deem worthy the expense of enclosing, and yet it would be a trespass, for any person to remove any portion of the stone or sand, without his consent; and he would be entitled to his action, even though the damages were nominal. It is not sufficient that the act be simply *per se*, a trespass; but, it must be a case of mischief, and of irreparable ruin to the property, in the character in which it has been enjoyed.

ple, an injunction will be granted to restrain the payment of money where such payment is injurious to the person to whom it properly belongs; or is in violation of a trust. So, on the application of a part-owner, whose share is unascertained, and to obtain the usual security for its due return, an injunction will be granted to restrain the sailing of a ship. An injunction will be granted, in the nature of a bill *quia timet*, when an executor or administrator is wasting the assets of the estate.

Second, Courts of Equity will restrain the infringement of patents for inventions, and the violation of copy rights.[1] The remedy at law, is inadequate, both because it is impossible for a jury to ascertain the extent of damage, which may have resulted from an injury of this nature, and because, Courts of Law have no means of protecting the rights of the party, from future invasion.[2] A discovery and account, are also, in almost all

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[1] Congress having exclusive control of the Patent law, all actions for the infringement of patent rights, whether in law or equity, must be brought in the Courts of the United States; 7 Johns. Rep., 144; and 8th Paige R., 132. They also possess an exclusive jurisdiction over copy rights.

Patents were formerly considered as injurious monopolies, and therefore, construed by the Courts with strictness. But more liberal and just views now prevail, and they are considered as advantageous to the public, by holding out encouragements to ingenious men, to disclose their inventions. Lord Eldon has repeatedly represented them as bargains between the public and the inventors, to be judged of by the rules of good faith. The same principles have been adopted in our own country. (Vide 1 Sumner's Rep., 482.) But Courts have not gone so far as to recognise any property in an invention, independently of a grant by the government. Even when inventors, not intending to dedicate their discoveries to the public, have communicated their secret to others, in confidence, who have betrayed that confidence, and endeavored to take advantage of the invention, to the prejudice of the inventors, Courts of Equity have still refused to interfere, to restrain the fraud, but have chosen to leave the complainant, to his remedy at law, against the breach of contract, or the fraud of the wrong-doer.

[2] Applications for injunctions have been much more frequent in England than in the United States. The reason is, that in the United States, the patentee has had a more adequate remedy at law, for damages. In the United States, the patentee may safely rely upon his remedy, at law, if the parties infringing, are able to respond to his claim

cases, indispensable to full relief. The principles applicable to the two classes of cases, are not entirely the same, and they therefore, need a distinct consideration. The mere existence of a patent, will not induce Courts of Equity to interfere, by way of injunction.[1] If it's validity has not been ascertained by an action at law, or if there has been no possession on the part of the complainant, to raise the presumption of exclusive right, or, if the patent has been recently granted, and has not gone into public use, an injunction will not be granted, where the defendant denies its validity, until the right has been established at law.[2]

In the case of copy rights, Courts of Equity will interfere, whenever there is clear color of title, founded on long possession, and assertion of right. But, where the work, which it is

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for damages. In England, the security of the patentee is sometimes increased, and his remedy for indemnity, facilitated, by the proceedings in equity, in which the Court, instead of enjoining the party complained of, to stop the manufacture, frequently orders him to keep an account of it, so that, if the plaintiff shall succeed in establishing his right at law, the rule of damages may be the the profits accruing from the manufacture; vide Phillips, on Patents, page 456.

[1] Where the patentee has openly encouraged, or silently acquiesced, in the use of his invention, by others, whether or not, that circumstance would constitute a complete defence at law, in a suit for an infringement of the patent, it would certainly furnish a clear and satisfactory ground, why a Court of Equity should not interfere, either to grant an injunction, or to protect the patentee, or to give any other relief; 1 Story, 282.

[2] In a recent case, in the Circuit Court of the United States, for New Hampshire, (see Law Reporter, November, 1845,) Judge Woodbury held, that in a suit in Equity, for the violation of a patent right, an injunction will not be granted before a hearing, upon the merits, merely upon proof that the complainant has obtained a patent. But proof of undisturbed possession and user of the patent right, for a reasonable length of time, by the complainant, is ground for granting an injunction. It is also ground for granting an injunction, that the complainant has prosecuted other persons and recovered judgment against them; and it makes no difference, that such judgment was rendered by agreement of parties, where there was no collusion. An injunction will not be dissolved as a matter of course, on the coming in of the answer, denying the equity of the bill, if the complainant has adduced auxiliary evidence of his right.

alleged, has been pirated, is immoral or libellous, they will not interpose; on the ground, that it is inconsistent with the principles of public policy to admit the existence of property, in such a work.[1] The practical application of this doctrine, is extremely difficult, from the infinite variety of opinions among men. It is very often, an embarrassing question, to determine whether there has been any violation of a copy right. The right to make a *bona fide* abridgement of a book, or reasonable quotations from it, or a fair use of the common materials in the composition of another work, is universally conceded. The principle which has been established as a test, both in England and America, is, that there must have been such a fair exercise of a mental operation, as to give to the new publication the character of an original work, and it is then immaterial whether the first author is injured or not, as there has been no invasion of his legal rights. The usual practice of the Court, on bills of this nature, is to refer the subject to a Master, and direct him to ascertain whether the books differ, and in what respects, and this report is usually made the basis of its interlocutory, and final decree. Where a work is partly original and partly pirated, it is no objection to the granting of an injunction, that the sale of the

[1] The proceeding in Equity is only to make effectual a legal right. As it has been settled in numerous cases, that no action at law can be maintained to recover the value of obscene or libellous prints, or books, there can be no just title to them as property, and therefore, no ground for the interposition of Equity. But *prima facia*, the copy right confers title, and the onus of showing an intrinsic defect, rests upon the other side. (Vide note to Story's Commentaries, vol. 1, page 259.) Lord Eldon, however, in the case of Lawrence *vs.* Smith, 1 Jacob, 471, refused an injunction, on the ground, that he entertained a *doubt*, whether the book could be the subject of property. That case may furnish an illustration of the difficulties which must attend the application of the principle, stated in the text. The work of the plaintiff was called "Lectures on Physiology, Zoology, and the Natural History of Man," which, in fact, had been delivered by him, at the College of Surgeons, and is a book highly esteemed, among men of science. But Lord Eldon refused to protect the author's claim to it, as his property, because he felt a *doubt*, whether the general tenor, and some particular passages of the book, were not inconsistent with the doctrine of the immateriality, and immortality of the soul, as taught in the Scriptures.

whole book will be prevented. The principle is well settled, that on a wilful confusion of good, the party who has committed the wrong, shall loose the benefit of what is really his own. Chancery will not, however, grant an injunction against the whole of a book, unless the part pirated, is such, that an injunction against that part, necessarily destroys the whole. [1]

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[1] The proceeding in Equity, being the remedy almost invariably resorted to, in this country, for the infringement of a copy right, it may be well to review the doctrine more at large, and to consider, when a copy right is violated, what may be the subject of it, and when it will be protected.

1. *When a copy right is violated.*

1. The mere colorable curtailment of a book, by the omission of some unimportant parts, is a piracy of the original copy right; and the question does not, in this case, depend upon the quantity, but the value of the selected materials. The quintessence of a work, may be piratically extracted, so as to leave a mere *caput mortuum*, by the selection, in a comparatively small space, of all the important passages; 3rd Mylne & Craig, 737; 1 Story's C. C. R., 11. Thus, it has been held, to be piracy, to collect together, and reprint from Law Reports, all the cases on a particular subject, though the collection and classification may be new, and with the addition of several previously unpublished decisions and notes; 2d Irish E., 266. Where one work is thus extracted from another, with only colorable alterations or additions, the right to make the publication, depends upon the same principles, (for, it is, in fact, the same operation,) as the right to make extracts or quotations, and the main question to be determined is, whether the last work will injure or supersede the first. But this principle, we apprehend, is not applicable to the case of a fair and *bona fide* abridgement, which, as Lord Hardwicke has observed, may, with great propriety, be called a new book, because it requires, on the part of the author, the exercise of invention, learning, and judgment, and which, he adds, are extremely useful; 2 Atky., 143. This is the inference to be drawn from the language of Lord Eldon, in Wilkins *vs.* Aikin; 17th Vesey, 426: "The question, upon the whole," says he, "is, whether there is a legitimate use of the plaintiff's publication, in the fair exercise of a mental operation, deserving the character of an original work. The effect, I have no doubt, is prejudicial; it does not follow, that therefore, there is a breach of the legal right." Thus, Sir T. Clark dismissed a bill for an injunction to restrain the publication in a magazine, of a fair abridgement of Rasselas; and a *bona fide* abridgement of Hawkesworth's Voyages, was considered no violation of the copy right.

2. When a portion of one work has been republished in another; as

Third, Courts of Equity recognise and will protect, by injunction, the rights of property, in unpublished manuscripts, of a literary, scientific, or professional nature. A strong instance of the extent to which this interposition will be carried, was af-

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the legal right of the plaintiff, to the materials which have been extracted, is clear, the only question that can arise, is, whether or not, he has sustained any damage. A man may adopt part of the work of another. The *quo animo*, is the inquiry in these cases. If an encyclopedia, or review, should copy so much of a work, as to become a substitute for it, it would be an actionable violation of literary property, even without the *animus furandi*.

2. *What may be the subject of copy right.*

1. The Act of Congress enumerates, "books, maps, charts, musical compositions, prints, cuts, and engravings." A translation is as much the subject of copy right, as an original composition; 3 V. & B., 77.

2. A copy right may exist in a part of a book, when the whole is not the subject of it; as, for example, in notes, additions, and alterations, affixed to an old work. Such, are editions of the classics, with annotations. Thus, Lord Hardwicke granted an injunction to restrain the printing of Milton's Paradise Lost, with Dr. Newton's notes.

3. A work may be the subject of copy right, although the materials which compose it, may be found in the works of other authors, antecedently printed, provided the plan, the arrangement and the combination of the materials is new; 1 Story, C. C. R., 11; Law Reporter, vol. 8, 270.

4. It was held, in Clayton *vs.* Stone, by the Circuit Court of the United States, that a price current, published in a semi-weekly news-paper, was not a book within the Act of Congress, because it is not a work of science or learning, but of mere industry. But in England, after considerable doubt, and very ingenious arguments, it has been held, that a composition, published on a *single sheet* of paper, was privileged as a book under the statute; 11 East., 244.

5. It has been held, that the opinions of the Supreme Court of the United States, being published under the authority of Congress, are not a proper subject of private copy right; although it is otherwise, as to the abstract of the decision, the marginal notes, and the arguments of counsel, prepared by the reporter; 8th Peters, 591.

6. In England, the right to the exclusive publication of certain works, is vested in the Crown, by *prerogative*, and has been made the subject of grant, from time to time, to various patentees. Such are Acts of Parliament, books of common prayer, and the translation of the Bible. Almanacks were supposed to be comprehended under this right, and the exclusive privilege of printing them, had been granted by letters patent

forded in the case of Dr. Paley, who left certain manuscripts to be given on his death, to his own parishoners only; a book-seller, into whose possession they had fallen, was restrained from publishing them. And, in the case of private letters, whether literary, or simply on matters of business or friendship, the established doctrine of Courts of Equity, is, that the receiver has only a special property, which does not invest him with any authority to publish them, unless it is required for the purposes of justice.[1] Courts of Equity will also restrain the publication

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of James I., to the Stationer's Company, and the Universities of Oxford, and Cambridge. One of the earliest and most brilliant efforts of Erskine, was made in the case of Carnan, in resisting, and successfully too, the validity of this patent.

3. *When the infringement of the copy right will be restrained.*

1. An equitable title will be protected in Chancery; 2 Russell, 385.

2. A performance of the conditions prescribed by the Act of Congress is indispensable to the vesting of a copy right, as there is no copy right at common law, in this country; 8th Peters, 591. But in England, the directions of the statute are not regarded, as conditions precedent; 7 T. R., 620.

3. Where the plaintiff's title is perfect, his right to an injunction may yet be lost, by unreasonable delay; 3rd Beavan 133; or by any acts which may be construed, by the defendant, into a permission, on the part of the plaintiff, to use the materials, he has employed; 3rd Mylne & Craig, 712.

[1] In 3rd Edw., 531, it was held, in opposition to the doctrine of the text, that Chancery assumes jurisdiction to restrain the publication of private letters, on no other or broader principle, than that of copy right, or, of literary production, or, of a property in the paper on which they are written. It will not exercise the power to prevent the publication of private letters of business, on the ground of copy right, or of literary property, when they possess no attribute of literary composition. Nor, because they were written in confidence, and the publication might wound the writer's feelings. The cases on the subject, were reviewed at length, by the Vice Chancellor, in his opinion, including those of 2d Swan's, 418, and 8th Paige, 24, to which Mr. Justice Story refers, and it was considered, that they by no means, sustained the broad principles stated by him. Chancellor Kent lays down, in his Commentaries, Vol. 2, page 381, what seems to us, the most reasonable doctrine: "The publication," says he, "of private letters, ought to be restrained, when it would be a breach of confidence and trust, as letters of courtship, or when injurious to the character and happiness of others."

without the consent of the author, of a dramatic composition, which has been acted at a theatre; as his permission to act it, is not construed to be an abandonment of his title. In England, relief has been granted against the piratical publication for profit, of lectures delivered orally, and taken down in short hand, by the pupils. The right of the oral lecturer, to print and publish his own compositions, is secured by their statute; but as it does not fall within any of the provisions of our act, on the subject of copy right, the publication could only be restrained, on the ground of an implied confidence or agreement between the lecturer and hearer, that the latter should use no means to deprive the former of the sole right to his lectures.

Fourth, Courts of Equity will restrain the fraudulent assumption of a name or label, which has acquired an extensive reputation, for the purpose of supplanting the true owner, and injuring his business.[1]

7. When will Courts of Equity restrain a party from the commission of acts, inconsistent with his legal obligations?

Some of the cases have been already enumerated, in the chapter on Specific Performance. Equity will interpose, either when damages would not furnish an adequate compensation for the injury sustained, or where the necessity of resorting to the legal

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[1] An injunction will lie to restrain the defendant from assuming the name of the complainant's newspaper, for the fraudulent purpose of imposing upon the public, and supplanting him in the good will of his paper. But to entitle the complainant to the interposition of the Court of Chancery, the name of his paper must be used in such a manner, as to be calculated to mislead the public, and to induce them to suppose that the paper printed by the defendant, is the same as that which was previously being published by the complainant, and thus to injure the circulation and patronage thereof; Bell *vs.* Locke, 8 Paige, 75.

The good-will of an established trade, the custom of an inn, and the right of a publisher of books, may be injured, by acts of deception and piracy; but the injury for which redress is given, in such cases, results from the imposture practised upon the customers of an existing establishment, or the public. A newspaper establishment is a subject of property and of contract, and the right to it will be protected in Chancery. A person having sold such an establishment, has no right to continue the publication as the same; but he may set up a different rival paper; Snowden *vs.* Noah, Hopk., 347.

tribunal would be so frequent, as to make the remedy worse than the disease. Thus, an attorney has been prevented, by injunction, from disclosing secrets, communicated to him, in the course of a confidential employment. A singular case is reported, in P. Williams, vol. 2, page 266, which very strikingly illustrates the doctrine of Equity on this subject. Certain persons living so near the parish church, as to be disturbed by the ringing of the five o'clock bell, in the morning, entered into an agreement, with the parish offices, to erect a cupola and clock, in consideration that the ringing of the bell should cease. The agreement was executed, and the bell silenced for about two years; but a new order of vestry having been obtained for ringing it, Lord Macclesfield granted an injunction, till the hearing; and the Lord's Commissioners afterwards decreed, that it should continue during the lives of the plaintiffs and the survivor. But as Courts of Equity, have no criminal cognisance, they will not grant an injunction against the publication of a libel, or the commission of a crime not connected with the rights of property.

CHAPTER XXIV.

EXCLUSIVE JURISDICTION. TRUSTS.

1. WHAT ARE TRUSTS, THEIR ORIGIN, AND VARIOUS KINDS.
2. NATURE OF A TRUST ESTATE.
3. WHAT IS ESSENTIAL TO THE CREATION OF A TRUST.
4. THE POWER OF TRUSTEES OVER TRUST PROPERTY.

1. What are Trusts, how did they originate, and into how many kinds are they divided?

A Trust, is a right or interest in property, distinct from the legal ownership.[1] Trusts are most exclusively recognised and protected in Courts of Equity,[2] of whose jurisdiction they constitute the most ancient, and by far the largest portion. They are supposed to have been invented by the clergy, for the purpose of evading the acts of mortmain, which disabled corporations from purchasing land, and being favored by the Chancellors, who were mostly ecclesiastics, and affording facilities to escape the burthens attached to land, under the feudal system, their use became so extensive, that in the 27th of Henry VIII,

[1] A trust is defined to be, an obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully, and according to such confidence; Bouvier's Law Dictionary.

[2] As between trustee, and cestui que trust, a Court of Equity has jurisdiction to enforce the trust; but for a wrong done to the trust property, by a stranger, the remedy of the trustee is wholly at law; A. K. Marsh, 242.

it was thought necessary to enact the famous Statute of Uses, annexing to the use the legal right of possession, and thus abolishing the distinction between legal and equitable estates. But the language of this Statute was not as comprehensive as its objects, and Courts of Equity, by a subtle construction, at once established the doctrine of Trusts, or uses upon uses; which, from its adaptation to the growing wants of a refined society, has expanded into a complete code of jurisprudence. "The advantages of Trusts," says Chancellor Kent, "in the management, enjoyment, and security of property, for the multiplied purposes arising in the complicated concerns of life, and principally, as it respects the separate estate of the wife, and the settlement of portions upon children, and the security of creditors are constantly felt, and they keep increasing in importance, as society enlarges and refines.

A trust may be created, either by an express declaration, to that effect, or it may be raised upon certain facts, by implication of law. The former are called Express Trusts, and are most frequently contained in marriage settlements, assignments for the benefit of creditors, and in last wills and testaments. The latter are called, Implied or Resulting Trusts, and will be particularly considered in a future chapter.[1] By the provision of the Statute of Frauds, 29th Chas., II. an express trust must be created or evidenced by some writing signed by the party entitled to create the trust; but no particular instrument or form

[1] An executed trust, is where the limitations of the equitable interests are intended to be complete and final; or, where the party executing the trust, has, in the language of one of the English Judges, "chosen to be his own conveyancer." In the trust executory, the limitations of the equitable interest are not intended to be complete and final, but merely to serve as minutes or instructions for perfecting the settlement at a future period. An executory trust, will not be enforced in Equity, except where it arises under a last will and testament, unless it is founded upon a valuable or meritorious consideration. But the rule is otherwise, in the case of executed trusts. Thus, Lord Eldon, says: "It has been decided, that upon an agreement to transfer stock, this Court will not interpose, but if the party has declared himself to be the trustee of the stock, it becomes the property of the cestui que trust, without more, and the Court will act upon it;" 18th Ves., 140; vide also, 1 J. C. R., 336. When the trusts are *executed*, in the sense in which we adopt the term, the legal rules of construction prevail; but, where executory, the instrument in which they

of words is requisite.[1] An express trust, supposes a legal transfer of the property actually completed, and a declaration in the same instrument, or having reference to the same, of the trust upon which it is to be held. When it is created for the benefit of a third person, without consideration, the grantor may revoke it at any time, before the *cestui que trust* has notice of its execution.

2. What is the nature of Trust estate.[2]

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are declared, being considered to contain the mere minutes or instructions for a more formal limitation, are construed in such a manner, as to carry into effect, the intention, so far as it may square with the rules of law and equity. Thus, in executory trusts, created by will, the rule in Shelley's case, will not be strictly followed in Equity. Trusts executed are limited in every species of instrument, signed by the party; but trusts executory, are seldom otherwise declared, than by articles entered into in contemplation of marriage, or by will, which are, of course, in anticipation of death; because, there are few other occasions on which it is not as convenient and desirable, to execute at once, the more solemn assurance. And no distinction appears to arise, upon the instruments by which trusts executory are declared, except that, where they are created by marriage articles, an inference is drawn, from the very nature of the instrument, of an intention to provide for the issue of the marriage, which induces this Court to endeavor, as far as it may be consistent, to put it out of the power of the parents to defeat the issue; whilst in the case of such trusts being created, by any other instrument, as, for instance, a will, the object not being extrinsically known, or presumable, it can only be collected from the language thereof; Jeremy's Equity, 32. Although the distinction between trusts executed, and executory, has been recognised in the United States, in the abstract, no case has been reported, where a Court of Equity has undertaken to *model* the trust, as is often done by the Chancellor of England, directing in minute detail, a settlement of estates in a technical manner, with the design of placing a restraint upon alienation; Am. Law Mag., vol. 5, page 312; Breckenridge's Essay on Trusts and Trustees.

[1] "But though technical terms are not absolutely necessary, yet no rule is better established, than, that where technical terms are employed, they shall be taken in their legal and technical sense." Lewen. 44.

[2] "The system of trusts, is more generally prevalent in limitations of personal, than of real property; particularly, personal chattels, as money, or stock in the funds, to neither of which classes of property, the statute of uses applied, and in which, therefore, the legal interest remained, at least for a time, subject to the narrow rules of the common

Trust estates have, generally, the same incidents and properties attached to them in Equity, as belong to similar estates at law.[1] They are alienable, descendible, and devisable, and subject to disposition, by operation of law, as other property.[2]

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law. Personal property, though once held incapable at common law, of partial or shifting limitations, has long, by a somewhat forced, though ingenious rule of construction, been released from that restriction; and therefore, in the settlement of chattels real, of which the title is distinct, from the possession, the creation of a distinct, equitable title, is not more often resorted to, than in the settlement of real property, of free-hold tenure. But it is in regard to that sort of personal property, the title to which, or rather, the power of conferring a title to which, is annexed to the possession, either from the nature of the thing itself, as in the case of money, or for reasons of public convenience, as in the case of bills of exchange, and in regard also, to stock in the funds, (a class of property over which the holder, whether it be in trust or not, has generally, an absolute power of alienation,) that the utility of trusts is more particularly conspicuous. Whenever it is sought to create, in any such property, shifting or partial interests, nothing can secure future or contingent rights, from the dishonesty of the tenant for life, or partial owner, but the intervention of trustees, in whose hands the whole legal interest, that is to say, the whole power of alienation, resides, and though a similar danger is sometimes to be apprehended, even at their hands, yet their number itself, and the discretion that may be exercised in their appointment, afford a greater security than is to be found in the integrity of a single individual;" Brande's Encyclopedia, Article Trusts.

[1] 3 Desau. 261; 3rd Hay, 68, 1 Dev. & Batt, 210; 2 Black., 198; 2 Harr., 225. Equity subjects trusts to the same construction, that a Court of Law does legal estates; and a donee must have capacity to take, whether it is attempted to convey the title directly to the party himself, or to another, in trust for him; 6th Porter., 269.

[2] In England, trust estates do not escheat for felony, or want of heirs. Where a trust estate fails *ob defectum sanguinis*, a peculiar construction prevails. As the lord has no title, by escheat or otherwise, to the estate, the Court of Chancery will not compel the trustee to relinquish it to him, and consequently the trustee having the legal title, and not being any longer bound by a trust, may have the actual enjoyment of the property, for his own benefit. But a trust for an alien enures to the crown, and in this country, to the commonwealth. Thus, it has been held, in New York, that where an alien purchases real estate in fraud of the law of escheat, and takes a conveyance in the name of a third person, either upon an express and declared, or a secret trust, to permit

Thus, they will pass by a general assignment in bankruptcy, or insolvency, although the purposes of the trust may, in this way, be defeated; for it is contrary to the policy of the law, to permit the enjoyment of property, apart from the burthens to which it is incident. The most remarkable deviation in executed trusts, from the rules in relation to legal estates, is that a man may be tenant by the curtesy in the trust estate of his wife, but a woman is not entitled to dower in the trust estate of her husband. There is no foundation in principle, for this anomalous distinction, and it would have been long since overruled, but for the great number of titles, which had been acquired under the impression that dower would not attach to a trust estate.

That the rules of property may be the same, as far as possible, in Equity, as at law, the analogy of legal estates is followed, even as to the remedies for the protection or extinguishment of the rights and interests of the *cestui que trust.* Thus an adverse claim, to a trust estate, accompanied by possession, for twenty years, may bar the *cestui que trust.*

3. What is essential to the creation of a trust?

A trust must be so certain and definite, as to its objects and the persons who are to take, as to admit of being enforced in a Court of Equity, or it will fail, and the property fall into the general funds of the grantor. Thus, the bequest of the residue of an estate to executors, "to dispose of, at such times, and in such manner, and for such uses and purposes, as they shall think fit, it being my will that the distribution thereof, should be left to their discretion," was held to be void, and the next of kin took the estate. But it is not necessary that a trustee, should be appointed by the grantor. Whenever a trust exists, Courts of Equity will not permit it to fail for the want of a trustee, whether that want arises from no person having been appointed to execute it, or from the death or refusal to act, of the party originally designated, or from any other cause; but will follow the legal estate,

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the alien to receive the rents and profits thereof, the interest in such trust, belongs to the State, and may be enforced in its favor and for its benefit in a Court of Equity; 5 Paige, 114. The whole doctrine is discussed with great learning, in 3rd Leigh, 492, and the Court affirms the same principle.

and decree the person in whom it is vested, unless he is entitled to equitable protection, to execute the trust. Where a trust has been created, by a last will and testament, and no trustee appointed, the personal representative is deemed the trustee as to personal estate, and the heir, as to the real estate.

4. What are the powers of trustees over trust property?

The duties and powers, and responsibilities of trustees, will be considered in a future part of the volume. It is only necessary to say, in this connection, that the trustee is clothed with the legal estate, not for his own benefit, but for that of his *cestui que trust*, and except by a sale to a a *bona fide purchaser*, for a valuable consideration, without notice, cannot prejudice the interests of his beneficiary. It is not subject to dower, or curtesy, or to the specialty or judgment debts of the trustee, and in the event of death, does not devolve upon his heirs or representatives. A trustee has, in general, no right to change the nature of the estate, by converting land into money, or, *vice versa;*

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[1] The various American cases, on the subject of trusts, are cited throughout the volume, under the titles which they illustrate. But the following decisions, establishing distinct general propositions, would seem to me, most appropriately grouped in this place.

1. A secret trust will not be recognised. In order to entitle it to the protection of the Court, it must be disclosed; 1 Johns. Ch. Rep., 524.

2. Any *legal* trust is sufficient to sustain a conveyance to the trustee, of an estate commensurate with such trust, without reference to any illegal trusts, which the testator or grantor may have attempted to create in the same estate. If the legal trusts, can be separated from those which are illegal, they will be sustained; 8th Paige, 104.

3. In a suit against a trustee, in relation to the trust estate, demanding what he might rightly hesitate to grant, except under the protection of the Court, Equity will not charge him with costs; 12th Ohio, 287.

4. A state may be a trustee in Equity; and can do no act to prejudice the cestui que trust, either by transcending the powers of the trust, or failing to perform what the office of trustee requires to be performed, to insure the proper execution of the trust; 1 Yerger, 296.

5. When a corporation aggregate is formed, and the management and control of its officers are in the hands of directors, the latter became the agents and trustees of the corporators, and a relation is created between the stock-holders and those directors, who, as trustees, become accountable for dereliction of duty, and violation of trust; 1 Edwards, 4.

but, it may be done, where the *cestui que trust* is not of age, or *sui juris*, and his interests require it.

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6. A person, for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in Equity, to have it paid directly to himself; 7 Cranch, 69, 97.

CHAPTER XXV.

MARRIAGE SETTLEMENTS.

1. IN WHOSE FAVOR WILL THE SPECIFIC EXECUTION OF MARRIAGE ARTICLES BE DECREED.
2. PERSONAL CHATTELS MAY BE LIMITED IN EQUITY, AS WELL AS REAL ESTATES OF INHERITANCE.
3. THE OFFICE OF TRUSTEES TO PRESERVE CONTINGENT REMAINDERS, THEIR POWERS AND DUTIES.

1. In favor of what persons, will the specific execution of marriage articles be decreed?[1]

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[1] The obvious purposes to be effected, by deeds of marriage settlement, are, to make provision for the husband and wife, and the issue of their marriage. The rights which the law would otherwise attach to the marital relation, may be thus varied and controlled, and a safe-guard erected against the consequences of misfortune, or improvidence. The most common mode in which these settlements are executed, is, either to vest a portion of the property in trustees, for the sole and separate use of the wife, independent of the control of the husband; or, to vest the property of both parties, in trustees, for the benefit of the husband, durin their joint lives, then, for the benefit of the survivor, and after his or her death, for the benefit of the children, in such proportions, as the nature of the property, or the circumstances of the family may dictate. In most of the states, they are not valid against creditors or purchasers, unless recorded within a fixed period.

1. As to the consideration which is necessary to support a marriage settlement.

Courts of Equity will enforce the specific execution of marriage articles. On the application of persons, who come within the reach of the marriage consideration, or of those claiming under them; except as *against bona fide* purchasers, for a

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Marriage is not only a valuable and *bona fide* consideration, but the very highest known to the law; and, therefore, marriage settlements will always be supported, unless an intention to deceive or defraud creditors can be shown; 2d Desau., 264. If the marriage contract is executed, the wife is regarded as a purchaser; if executory, as a creditor, until it is performed; and whether her portion is as a creditor or purchaser, her rights are the same as purchasers, for money, or creditors, by bond; 1 Bald. C. C. R., 344; vide also, S. P. 3 J. C. R., 550; 7 P. U. S. R., 348; 11 Leigh, 136; 1 Freem., 310. When the settlement is executed after marriage, but in pursuance of an agreement in writing, entered into before marriage, it will be valid, both against creditors and purchasers. Where the ante-nuptial agreement was by parol, a different rule prevails; 3 J. C. R., 481; unless indeed the parol agreement was one which might have been enforced, or there is evidence of it, in writing, *aliunde*, or by way of recital in the deed itself. An ingenious and learned writer in the American Law Magazine, vol. 1, page 316, has contended, that Courts of Equity, might have gone farther, and, in analogy to their decisions on questions, arising in reference to the sale of real estate, have held, that all post nuptial settlements, were valid, without requiring subsequent evidence in writing, or proof of actual fraud. "Marriage," he says, "falls under the same general principle, as part performance." The marriage contract cannot be dissolved, and the parties remitted to their former condition. If, therefore, it has been entered into, and consummated upon the faith of a previous parol agreement, to make a settlement, the parties, respectively, are in a condition in which they cannot be placed in *statu quo*. There is nothing more stringent, in the words of the statute, in the one case than in the other. And, certainly, the degree of injury is much greater, where interference is refused on the ground of the statute, in a case, the equitable circumstances of which, would justify it. It is difficult to see, upon what solid principles, rests the distinction; and it can only be accounted for, from the fact, that the chancellors have felt that their construction of the statute was a plain usurpation of the province of the Legislature, and not to be extended beyond the cases in which they were bound, by the authority of previous decrees. Where the settlement is executed after marriage, although not in pursuance of an agreement before marriage, it will be supported, if made bona fide, and for a valuable consideration; 10th Vesey, 146; 7th J. C. R., 61; 8th Wheaton, 229; 4 Desau., 560; vide

valuable consideration without notice. But they will not assist mere volunteers. They will not enforce a voluntary contract, made before or after marriage, but not in consideration thereof, even on behalf of a wife or child. But where marriage articles

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also, Blow *vs.* Maynard, 2d Leigh, 40, where the whole doctrine of post nuptial settlements, is very learnedly examined by Judge Carr.

2. Who may become a party to a marriage settlement.

Where a female infant, on the eve of marriage, executes a settlement of her real estate, it is a voidable conveyance, which she may repudiate, upon attaining her majority. Whether she can elect to disaffirm it during her coverture, is a vexed question, but, the preponderance of opinion is, that she cannot. But she may affirm it, during coverture, after she becomes of age, by a conveyance, such as is prescribed by statute, for the transfer of her interests; 1 Sand. R., 153; 2d Leigh R., 76; 5 Serg. & Raw., 312; 2 Russ. & Myl., 365.

3. The intervention of trustees is not regarded by Courts of Equity as necessary to protect the interests of the wife, whether the settlement is made before or after marriage; 3rd Paige, 440; 1 Rice's Equ. R., 315; 8th Yer., 33; 3rd Henn. & Mun., 399, 2 V. How., 751.

In the case of Wallingford *vs.* Allen, 10th Peters, 594, the Court use the following language: "Agreements between husband and wife, during coverture, for the transfer from him of property, directly to the latter, are undoubtedly void at law. Equity examines with great caution, before it will confirm them. But it does sustain them, when a clear and satisfactory case, is made out, that the property is to be applied to the separate use of the wife. Where the consideration of the transfer is a separate interest of the wife, yielded up by her, for the husband's benefit, or of their family; or which has been appropriated by him to his own use; or, where the husband is in a situation to make a gift of property to his wife, and distinctly separates it from the mass of his property for her use; in either case, the agreement will be sustained in Equity; though no trustee has been interposed to hold for the wife's benefit."

But it has been held in Connecticut that an agreement between husband and wife, during coverture will not be enforced in Chancery, 1 Day. R. 221.

4. Marriage articles are not to be rescinded after the marriage, even by consent of the husband and wife, or by any conveyance which they or either of them can make: but may be enforced in Equity, at the suit of the issue, (whether *in esse* or in *ventre sa mere*,) or of any other persons for whose benefit such articles were intended: the children born of the marriage, being purchasers, under both father and mother by virtue of the articles. 3 Hen. & Mun, 399.; Tabb & others *vs.* Archer and

contain limitations, both in favor of those, to whom Courts of Equity will lend its aid, and of those to whom it will not, the latter may indirectly obtain the benefit of them; for the Court,

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others. This is a leading case. So in 9th Dana 481, it was held that marriage articles are always understood in Equity, as being ultimately for the benefit of the children, where there is nothing to indicate the contrary.

5. Marriage settlements have been generally construed upon fair and equitable principles, and with a view to uphold the intentions of the parties in their execution. 3 Hen. & Mun. 399.

But the inclination of the more modern authorities seems to be, to regard them as trenching upon the just marital rights of the husband, and therefore to be extended no farther by construction against him, than the language of the instrument imperatively requires. Vide American Law Magazine, vol. 3. p. 16.; 3 J. C. R. 523; 17 Johns, 548. Judge Platt in the last case, very strongly expresses the objections which may be urged against them on the score of policy.

"Marriage settlements," says he, "give to the wife the ambiguous character of a feme couvert, and a feme sole. I view them as an adulteration of that holy union—as a divorce, pro tanto, of the marriage contract. A wife in the independent enjoyment of her separate estate, armed with distrust of her husband, and shutting out his affections and confidence, by refusing to give her own in mutual exchange, is an object of compassion and disgust. Legal chastity cannot be denied to her, but there is danger that the sacred institution of marriage may degenerate into mere form. If in the rapid progress of refinement in civilization, it shall be thought expedient to go one step further, and to allow the wife by anti-nuptial contract, to stipulate for an exemption from personal control by the husband, then the quasi divorce would be extended, so as to confer on her the independent enjoyment of the rights and privileges of a kept mistress; but she would have little claim indeed to the endearing appellation and character of a wife. A rule that not only renders the wife independent of her husband as to her fortune, but debars him from a participation of it by new and increased impediments, as if he were presumed to be her worst enemy, tends to sever the marriage union.

The ancient rule of the common law accords best with the simplicity of society, among us in this country. I know that particular cases often occur where such restraints would be salutary; but as a general rule, their operation must be unfavorable to connubial happiness. The same benign policy which forbids divorce, also forbids the extension of a rule which impairs the union and lessens the attractions of matrimony. It is

on the application of the proper persons, will decree a specific execution *in toto.*

2. May personal chattels be limited in the same way, and to the same extent, as real estates of inheritance?

The prevailing (though not universal,) doctrine is, that a remainder cannot be limited at law, upon a life estate *or* a personal chattel, except by way of executory devise. But they may be limited in Equity, by deed of trust, as effectually, as real estates of inheritance at law, even in strict settlement.

3. When is it necessary to appoint Trustees to preserve contingent remainders, and what are the powers and duties attached to their office?

The determination or destruction of the particular estate, on which a contingent remainder was limited, before the latter *vested.* by feoffment or other conveyance acting on the possession, or by any act inducing a forfeiture, amounted at common law to a destruction of the remainder. This rule did not apply, where the conveyance was of a thing lying in grant, or where it derived its efficacy from the Statue of Uses, as in the case of bargain and sale. To preserve contingent remainders from the operation of the feoffment, or forfeiture, recourse was had to the creation of trustees, eo nomine, to preserve them during the life of the tenant for life, notwithstanding the premature determination of the particular estate. The estate thus given to the trustees, is a legal freehold remainder, *pur autre vie*, which is vested, and upon which there of course arises a right of entry, in case the particular estate should be determined by the tenant for life, before its natural expiration; and by virtue of which the contingent remainders subsequently limited may be preserved, without any interference with the beneficial enjoyment of the property.

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better that confidence between husband and wife should sometimes be abused, than that it should not exist. We often see acts of tyranny and cruelty exercised by the husband towards the person of the wife, of which the law takes no cognizance, and yet no man of wisdom and reflection can doubt the propriety of the rule which gives to the husband the control and custody of the wife. It is the price which female wants and weakness must pay for support and protection."

This precaution is still used in settlements on marriage, or by will, where there are contingent remainders to be protected. The trustees are under the cognizance of a Court of Equity, and it will control their acts, and punish them for a breach of trust; and if the feoffment be made with notice by the purchaser of the trust, as was the fact in Chudleigh's case, a Court of Chancery will hold the lands still subject to the former trust. But this interference of Equity is regulated by the circumstances and justice of the particular case. The Court may, in its discretion forbear to interfere, or it may, and will, even allow or compel the trustees to join in a sale to destroy the contingent remainder, if it should appear that such a measure would answer the uses originally intended by the settlement.[1] As it is the duty of these trustees to preserve the inheritance, they can maintain or defend any action respecting the freehold, enjoin the commission of waste, &c.

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[1] Kent's Commentaries, vol. 4, p. 253.

CHAPTER XXVI.

TERMS FOR YEARS.

1. ORIGIN AND USES OF TERMS FOR YEARS.

1. What is the English doctrine as to terms for years attendant upon estates of inheritance?

Terms for years occupy a very large space in English Jurisprudence. They were originally invented for the purpose of securing the payment of money lent on mortgage of the land, or the payment of jointures and portions for children, or other special trusts. Where the purposes of the term have been satisfied, if the instrument does not provide for its cesser, the beneficial interest becomes a creature of equity, to be disposed of, and moulded according to the equitable interests of all persons having claims upon the inheritance. It is governed generally by the same rules, to which the inheritance itself is subject; following the descent to the heir, and all alienations of the fee or any particular estate carved out of it. The trustee will hold the term for equitable incumbrancers, according to their priority; and from hence arises the advantages of attendant terms. A *bona fide* purchaser or mortgagee, who has a mere equitable title, may cure the defect by taking the assignment of an outstanding term, at least so far as to entitle himself to the legal estate during the term, in preference to any creditor, of whose incumbrance he had not notice, at or before the time of com-

pleting his contract. He may use the term to protect his possession, or to recover it when lost. These attendant terms will not be permitted to deprive creditors of their just rights; but they will bar a claim of dower, where the assignment was actually made before the husband's death. When terms for years are created to raise portions for children, although the settler enters into a personal covenant to pay the portions, the real estate is considered as the primary fund.

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[1] In this country we have instances of long terms of near one thousand years; but they are treated altogether as personal estate, and go, in a course of administration, as chattel interests, without any suggestion of their being of the character of attendant terms. Our registry acts, applicable to mortgages and conveyances, determine the rights and title of bona fide purchasers and mortgagees, by the date and priority of the record; and outstanding terms can have no operation when coming in collision with a registered deed. We appear to be fortunately relieved from the necessity of introducing the intricate machinery of attendant terms, which have been devised in England with so much labor and skill, to throw protection over estates of inheritance. Titles are more wisely guarded, by clear and certain rules, which may be cheaply discovered, and easily understood; and it would be deeply regretted, if we were obliged to adopt this complex and artificial a system as a branch of the institutes of the property law. Kent's Com., vol. 4, page 94.

CHAPTER XXVII.

MORTGAGES.

1. WHAT IS A MORTGAGE, AND ITS CHARACTER IN EQUITY.
2. WHAT MAY BE THE SUBJECT OF A MORTGAGE, AND HOW IT MAY BE CREATED.
3. INTEREST OF THE MORTGAGOR IN THE LAND AFTER BREACH OF THE CONDITION.
4. INTEREST OF THE MORTGAGEE IN THE LAND AFTER BREACH OF THE CONDITION.
5. WHO MAY REDEEM, AND HOW MAY THE RIGHT BE LOST.
6. THE PRACTICE ON BILLS OF FORECLOSURE.
7. MORTGAGES OF PERSONAL PROPERTY.
8. PRINCIPLES OF PRIORITY WHERE THERE ARE DIFFERENT MORTGAGES.

1. What is a mortgage, and how is it regarded by Courts of Equity?[1]

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[1] The following interesting sketch of the growth of the equitable jurisdiction, is taken from Mr. Coote's treatise, referred to in the text:

"The absolute forfeiture of the estate, whatever might be its value, on breach of the condition, was, in the eye of Equity, a flagrant injustice and hardship, although perfectly accordant with the system on which, the mortgage itself was founded. No wonder then, that our Courts of Equity, pursuing the principles of the civil law, should, as they increased in power, attempt, by an introduction of those principles, to moderate the severity, with which the common law, followed the

A mortgage is defined, by Chancellor Kent, to be the conveyance of an estate by way of pledge for the security of debt,

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breach of the condition. They did not, indeed, attempt to alter the legal effect of the forfeiture, at common law; they could not, as they might have wished, in conformity to the principles of the civil law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage-money; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting in *personam*, and not in *rem*, they declared it unreasonable that he should retain for his own benefit, what was intended as a mere pledge; and they adjudged that the breach of the condition, was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem, on payment of principal, interest, and costs, notwithstanding the forfeiture at law. No sooner, however, was this equitable principle established, than the cupidity of creditors, induced them to attempt its evasion, and it was a bold but necessary decision of Equity, that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem; for, in every other instance, probably, the rule of law, *modus et conventio vincunt legem*, is allowed to prevail. In truth, it required all the firmness and wisdom of the eminent judges, who successively presided in the Courts of Equity, to prevent this equitable jurisdiction from being nullified by the artifice of the parties. But those Courts, looking always at the intent, and not at the form of things, disregarded all the defences, by which the creditor surrounded himself, and laid down as plain and undeviating rules, that it was inequitable, the creditor should obtain a collateral or additional advantage, through the necessities of his debtor, beyond the payment of principal, interest, and costs, and they established as principles, not to be departed from, that once a mortgage, always a mortgage; that an estate could not at one time be a mortgage, and at another time cease to be so, by one and the same deed; and that a mortgage could no more be irredeemable, than a distress irrepleviable; and, by the same reason, Equity will let a man loose from his agreement, and even against his agreement, admit him to redeem a mortgage, and, that whatever clause or covenant there may be in a conveyance, yet, if upon the whole, it appear to have been the intention of the parties, that such conveyance shall only be a mortgage, or, pass an estate redeemable, a Court of Equity will always construe it so. Thus, the harshness of the common law, was softened, without an actual interference with its principles, and a system was established, at once consistent with the security of the creditor, and with a due regard for the interests of the debtor."

and to become void on payment of it. Mr. Coote, in his valuable Treatise on the Law of Mortgage, with more especial reference, to its character in a Court of Equity, describes it, as "a *debt* by *specialty*, secured by a pledge of *lands*, of which, the legal ownership is vested in the creditor, but of which, the debtor and those claiming under him, remain the actual owners, until debarred by judicial sentence, or their own laches." At common law, when the debtor failed to pay the money at the appointed time, the mortgaged property became the absolute estate of the creditor. But Courts of Equity, looking to the substance of the transaction, continued to treat the mortgage, as a mere security for the debt; the mortgager, as the real owner of the land; the legal estate, which the mortgagee had acquired, as a trust for his benefit, and the mortgage, personal assets. The debtor was declared to possess, what was significantly termed, an Equity of Redemption, or a right to redeem the estate, within a reasonable period, upon payment of the debt, and all equitable charges.[1] The debt was regarded as the principal, the

[1] It is a practice, common in some of the States, and said to be gaining ground in England, to add to the mortgage, a power of sale, in case of default, thus depriving the debtor of the right of redemption, and avoiding the delay and expense of a foreclosure, by bill in Equity. The validity of a sale, under such power, has been recognised in New York, Missouri, and Massachusetts, and is sanctioned by the opinion of Chancellor Kent, and by some of the later English authorities. Mr. Coote says, that they are not within any of the mischiefs to be guarded against by a Court of Equity; that they give nothing to the creditor, beyond his principal, interests and costs; and that they bestow on him no collateral and ulterior advantage. In Virginia, Mississippi, and probably other southern states, a different principle has, (we conceive with better reason,) been established, and a mortgagee is regarded as disqualified by his interest, from discharging the functions of a trustee. The principles which have been frequently declared, in reference to the powers and duties of trustees, in general, are utterly incompatible with the due exercise of those powers and duties, by the creditor.

How can the mortgagee be expected to act impartially? It must frequently happen that, the time, the place, the manner of selling, will present questions of serious difficulty, and of great importance. The sum really due, may also admit of much controversy.' On all these points, as well as many others that might be mentioned, the interests of the parties may be, and frequently are, at direct variance; and to refer

land, the accessory; and therefore, an assignment of the mortgage, as a transfer of the debt, with its attendant securities, and a satisfaction of the debt, as an extinguishment of the mortgage.[1]

2. What is essential to constitute a mortgagor, and what kind of property may be mortgaged?

Every species of property, whether real or personal, in possession, or expectancy, which is capable of an absolute sale, may be the subject of mortgage.[2] No technical language, or instrument, is essential to constitute a mortgage. It is only necessary to establish a clear and definite intention of the parties, that an instrument should operate as a security for the repayment of money.[3] And this intention may be shown by parol evidence,

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them for adjustment, to the will of one party only, would be contrary to the clearest principles of natural justice. That any man should execute a deed conferring such powers, with a belief that it will be obligatory on him, affords another proof of the maxim, that the borrower is the slave of the lender. It is one of those cases, in which, it becomes necessary, to protect men against the effects of their own folly and imprudence; vide 1 Rand., 306. In 1 Freem., 49, the same principle is affirmed, and the Chancellor goes on to say, that to permit a mortgagee to exercise this power, would be to allow him to state his own account, to determine absolutely, upon the amount due him, pronounce a decree of sale in his own favor, and act as his own commissioner in the execution.

[1] An alien mortgagee has a right to come into a Court of Equity, and have the property which has been pledged for the payment of the debt, sold for the purpose of raising the money. His demand is merely a personal one, the debt being considered as the principal, and the land as an incident; 9th Wheat., 489.

[2] In the American Jurist, for Oct., 1842, there is a long and well written article, in which the validity of mortgages of rail-roads to the State, or to individuals, by rail-road companies, is disputed.

[3] Where, upon the face of a transaction, it is doubtful whether the parties intended to make a mortgage or a conditional sale, Courts of Equity, incline to consider it a mortgage; because, by means of conditional sales, oppression is frequently exercised over the needy; 1 Dev. Eq., 373; 5 Litt., 84; 2 J. J. Marsh, 471; 3 J. J. Marsh, 354. The test of the distinction is this; if the relation of debtor and creditor remains, and a debt still subsists, it is a mortgage; but if the debt be extin-

where by reason of fraud, accident, or mistake, a deed has been executed as an absolute conveyance. Wherever the contract was a loan, and not a sale, the creditor will not be permitted to gain any advantage by his security, beyond principal, interest, and costs. Courts of Equity will sometimes imply a mortgage, from the nature of the transaction, where there has been no express agreement to that effect. Thus, it is well settled in England, that if a debtor deposits his title deeds with a creditor, it amounts to an equitable mortgage, and is not embraced by the Statute of Frauds.

3. What interest has the mortgagor in the land, after failure to perform the condition?

Towards the mortgagee, he occupies the relation of a mere tenant at will, invested with a right of redemption, to be exercised within a reasonable period, and on equitable terms. While in possession, he is entitled to the receipt of the rents and profits, without account; but Equity, regarding the land with all its produce, as a security for the mortgage debt, will restrict the right of ownership, within those bounds, which may not operate to the detriment or injury of the mortgagee. The interference, however, of Courts of Chancery, with the discretion of the mortgagor, is not carried farther, and he will not be bound, in ordinary cases, to repair or keep the estate in order. Against all the world, except the mortgagee, he is regarded even by courts of law, as the actual owner, and as possessed of the es-

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guished by the agreement of the parties, or the money advanced is not by way of loan, and the grantor has the privilege of refunding, if he pleases, by a given time, and thereby entitle himself to a reconveyance, it is a conditional sale; 1 Paige Ch. Rep., 56; 2 Ball & B., 274; 7 Cranch., 237; 2 Edwards, V. C. Rep., 138; 14 Pick., 467; 2 Sumner, 534; 8 Paige Rep., 243. The intention of the parties, say the Virginia authorities, must determine the character of the transaction; and therefore, no precise rule of distinction can be laid down, for that intention is to be deduced from the particular circumstances of each case. When the purpose of the parties was to treat of a purchase, it is a conditional sale; where the object was a loan of money, and a security or pledge for repayment, it is a mortgage; and no act of the scrivener, can convert either into the other, contrary to the real understanding of the parties; 2d Call., 421.

tate, in his ancient and original right. His equity of redemption, is liable to the same incidents, as the legal estate, such as alienation, descent, devise, and even incumbrance; as it may be mortgaged for the purpose of raising or securing other sums of money.

4. What is the nature and extent of the interest of the mortgagee in the lands, after the mortgage has become absolute ?[1]

He may take possession of the land, and receive the rents and profits, but he is bound to apply them to the discharge of his debts after deducting reasonable charges and allowances. All acts of ownership which he may exercise over the mortgagor's property, enure in Equity to the benefit of the party, who is entitled to the estate.[2] Where the mortgage is in fee, the legal title descends to the heir of the mortgagee; but the estate is considered as a chattel interest, and belongs to the personal representative, as assets. But, as Courts of Chancery proceeding upon the principles of natural justice have erected a barrier to his absolute and uncontrolled enjoyment of the legal estate, in the Equity of Redemption, they will upon principles of reciprocity allow him to hasten the collection of his debt, by calling upon the mortgagor to redeem the estate within a reasonable period to be fixed by the Court, or in default thereof be forever foreclosed from the exercise of that privilege.

5. Who may redeem, and how may the Equity of redemption be lost?

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[1] After the condition has been broken, the mortgagee has three remedies. 1. To take possession of the mortgaged property, and apply the profits to the extinguishment of the debt. 2. To sue in a Court of Common law, and enforce his judgmeut either by execution, or by filing a bill, and obtaining a decree for subjecting the mortgaged estate by sale, to the satisfaction of the judgment. 3. By filing a bill in the first instance for foreclosing the Equity of redemption, and a sale of the mortgaged property. 2. B. Munroe, R. 204.; Vide 1 Black., 387; 9 Wheat., 489; 10th Ohio, 300.

[2] 2nd Sumn. 108. In Gordon *vs.* Lewis, 2d Sumn. 143, Judge Story held, that where a mortgagee is in possession, and the annual rents and profits exceed the interest of his debt, he should pay interest on the surplus.

The right to redeem is a subsisting estate or interest in the hands of the mortgagor, and of all persons claiming under him, either by operation of law, or otherwise in privity of title, whether legal or equitable. Thus, a judgment creditor, who has acquired an interest in the mortgage estate, may disengage the property from all prior incumbrances, in order to make his own claim available. Lord Hardwick felt himself bound to allow a prowling assignee, who had brought in the equity of redemption for an inconsiderable sum, to redeem. The equity of redemption may be barred by length of time; and in analogy to the limitation in actions of ejectment, the mortgagee will acquire an indefeasible title by an uninterrupted possession of the land under his mortgage, for the period of twenty years, without accounting to the mortgagor, or admitting in any other way the possession of a mortgage title only.[1] A contract for the sale of an equity redemption, subsequently to the mortgage, if made upon fair terms, will be supported. But no agreement of the parties, however explicit, if made at the time of the execution of the mortgage, that the redemption shall not attach to it, will be binding. Similar considerations will apply to the correspondent right of foreclosure, both as to the persons, by whom, and the time within which, it may be exercised.

6. What is the practice on bills to foreclose a mortgage ?[2]

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[1] A mortgagor in possession (who has not clearly manifested his intention to hold, as absolute owner) has a title and possession not adverse to, nor inconsistent with, the rights of the mortgagor. The mortgagee's estate in many respects, resembles a trust; and he is generally considered in Chancery as a trustee; in whose favor the principle of the Statute of Limitations, or bar by lapse of time, does not apply, until a satisfaction or dereliction, of the demand secured by the mortgage, must be presumed. 1 Dana, 280.

So, where the mortgagee has been permitted to retain possession, the mortgage will after a length of time be presumed to have been discharged, by payment of the money, or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment of the mortgage, and the like; 9 Wheat., 489.

[2] The practice in most of the States of our union is like that pursued

The English practice is to procure a decree for a strict foreclosure of the right to redeem, by which means the land becomes the absolute property of the mortgagee. The rule is relaxed in some special cases, and a sale of the premises directed, as for example, where the estate is not sufficient to pay the incumbrance, or when the mortgagor is dead, and there is a deficiency of personal assets.

7. How are mortgages of personal property distinguished from mortgages of real estate?[1]

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in Ireland, viz: to decree a sale instead of a foreclosure, and if the sale produces more than the debt, to pay over the surplus to the mortgagor. "The practice on foreclosing a mortgage, (and it is the same in Virginia and Kentucky) is, for the chancellor, on the first hearing, to decide on the sum due, to give a day for the payment, and to decree a foreclosure and sale *nisi*, and afterward in term to decide whether this decree has been performed, and if not, to make it absolute. The proceeding to foreclose a mortgage is in rem, to reach the pledge, and Equity has nothing else to do. Thus, it cannot, upon the property proving insufficient, decree that the defendant pay the balance, and give execution therefor;" 1 Monroe, 66.—The last principle is also affirmed in 3 V. E., How 381.

[1] The almost universal security for the payment of money in many parts of our country, is a Deed of Trust; and as this instrument differs in many important respects from a mortgage, it deserves a separate examination. It is to be observed that the general rules in reference to the duties and responsibilities of trustees, apply to these conveyances.

1. The characteristic difference between a mortgage and a deed of trust, is, as the name of the latter imports, the intervention of a trustee, invested with power to sell on default of payment. The preferableness of such a security to both creditor and debtor, over a mortgage, in which the mortgagee is clothed with similar powers, has been considered in a former note. It has been frequently contended that deeds of trust could only be enforced by bill in Equity, but all doubt on this point has been put to rest by repeated adjudications and uniform practice. 2 V. E. How., 896; 10 Ohio, 204; 14 Peters 19.

2. A *cestui que trust* having the legal title may maintain ejectment, after the trust is satisfied. 2d Rand., 422; 11 Oh., 334.

But a mortgage lives and dies with a debt, satisfaction destroys it. Hence, although there is some conflict among the decisions, it seems to be settled by the preponderance of authority, that on payment of the mortgage debt, after default, no reconveyance is necessary. 18 Johns., 7;

1. Personal property may be mortgaged without any formal conveyance, and by a simple transfer of possession.

2. The mortgagee of personal chattels is not compelled to file a bill to foreclose, but may sell at auction on giving reasonable opportunity to the debtor to redeem, and apprising him of the time and place of sale.

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3 Harr. & McHen., 399; 3 Mason., 520; 10 Ohio, 439; 5 Hill, N. Y. R., 272. Contra, 4 Rand., 225; 17 Mass., 419; 4 Rand., 225; Vide also, 5 Peters, 481.

2. A deed of trust is so far a mortgage, that the owner may at any time before a sale, require a reconveyance upon paying the money due. But the owner, cannot object to the sale by the creditor trustee, nor disturb his vendee, though by the terms of the original conveyance, the owner, was to join the trustee in the deed to the purchaser.

3. When a third person, disinterested and indifferent between the parties, is constituted the trustee, he takes the legal though defeasible title; which title becomes absolute in his vendee by his deed at law. And in a court of law his vendee need not show that the conditions of the trust deed have been complied with. While however, the vendee gets a legal title by the mere execution of the deed by the trustee, the original owner of the land, or his alienee, is not to be injured by a breach of trust on the part of the trustee. A purchaser from him, the requisitions of the trust deed not being complied with, does not in Equity, get a complete title. He does not get it, because, until then, the trustee is not authorized to convey it. 6 Munf., 358.

Here we see the distinction exemplified between a mere power and a power coupled with a title: for where an attorney in fact, or agent, or officer of the law who has no title, makes a sale by authority of the party or of the law, his deed will pass no title unless it be in strict conformity with the authority or the law; but the trustee who conveys, is *at law* considered as passing the legal estate, though Equity looking upon him merely as an agent or instrument, will avoid the deed, if not made conformably to his powers. 4 Munf., 431.

4. A trustee, in a Deed of Trust, is to be considered the agent of both parties; he ought to act impartially between them; he ought to disregard the suggestions of either party inconsistent with that duty; he has in general, no greater power, touching his trust than a commissioner of a Court of Equity. If there are impediments to the fair execution of the trust, such as arise, for instance, from a cloud about the title, which must prevent an advantageous sale, or if the amount which is to be raised is uncertain, and in order to do justice it is necessary to ascertain it, he himself, before proceeding to sell, ought to call upon a Court of Equity to lend its aid in removing the impediments, or in settling the

3. Subsequent advances by the mortgagee of personal chattels are presumed to have been made on their security; without any proof of a contract to that effect. This presumption, however, may be rebutted.

4. What are the principles which determine priority of payment between different mortgages?

Where one of several incumbrancers has acquired the legal estate, the doctrine of tacking, which has been already considered, prevails. Where there are several equitable incumbrancers, one may sometimes by superior diligence obtain a better equity. Thus, where there are different assignees of the same

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accounts. If in these cases, he fails to do so, then it is the right of the debtor to stay his proceedings by injunction, until these objects can be effected. Gilmer, R., 130; 1 Rand, 311.

5. It seems further to be settled, that where there are many incumbrances, a younger incumbrancer by deed of trust should not be permitted to proceed to sell, without having first brought all parties into a Court of Equity, in order to settle the amount of the prior incumbrances, subject to which his sale must be made: since otherwise the purchaser could not know what he was buying, and of course a fair sale could not be effected. And this was decided by analogy to the case of subsequent mortgages, which is said to be apt and clear; for in such case the subsequent mortgagee must convene all the prior incumbrancers before the court, for the purpose of ascertaining the amount due to them; and he is entitled to make the most of the fund for his and their benefit, by removing all impediments to a fair sale. Gilmer R., 133.

On a bill to foreclose a mortgage, it seems to be yet unsettled, whether subsequent incumbrancers are indispensable parties. Vide Vesey, jr., vol. 3, 15; Sumner's edition, in notes.

6. An injunction will be granted to stay proceedings under a deed of trust, for any cause, which would invalidate the security at law, such as usury, or other void consideration, or where it was obtained by fraud or oppression. A Court of Equity proceeds upon the ground that a party has had no day in Court, to contest the fairness of the creditor's claim, and that without its interposition, there would be no tribunal before which he could defend himself. 2 Mun.. 407; 1 Rand, 179.

7. Where two trustees are appointed, without making provision for any one to act, the death or refusal of one to proceed, after acceptance of the trust; or where there is only one trustee, his death or refusal; or the acquisition by him of an interest under the deed, which converts the security at once, into a mortgage, will make it necessary to resort to

equitable interest, neither of whom had any knowledge of a prior incumbrance, he who first gives notice of his title to the holder of the legal interest, will acquire a right to priority of satisfaction.[1]

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equity for the purpose of enforcing the deed. It has been also held, that the death of the debtor was a sufficient reason for arresting the execution of a Deed of Trust without the aid of Equity; since the duty of redeeming, and the benefit of redemption, which were before blended in the same person, are separated, the duty devolving upon the executor, and the benefit accruing to the heir. 3 P. Williams, 333. The student will find the subject of this note, considered more at large, in Tucker's Commentaries, and Robinson's Chancery Practice. Vide also 14 Peter's, U. S. R., 19.

[1] Vide 1 Rand. Rep., 466; 2d Dev. & Batt., 51; 13th Ohio Rep., 240.

CHAPTER XXVIII.

ASSIGNMENTS.

1. WHAT IS AN ASSIGNMENT, AND HOW REGARDED IN EQUITY.
2. GROUNDS OF EQUITABLE JURISDICTION ON ASSIGNMENTS.
3. WHAT MAY BE THE SUBJECT OF ASSIGNMENT.
4. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS BY INSOLVENT DEBTOR.

1. What is an assignment, and how is it regarded in Equity?

An assignment may be general, as when an insolvent debtor makes a conveyance of his property, for the benefit of his creditors; or special, as when one man grants to another, some right, title, or *chose in action*. No technical words are necessary to constitute an assignment in Equity.[1] Any order, act, or writing, which makes an appropriation of a fund, amounts to an equitable asssignment of it.[2] At common law, no assignment

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[1] Any words, which show the intention of the parties to make a transfer of the debt, will amount to an assignment; 1 Black., 138.

[2] When the charter of a bank expressly requires that the transfer of stock be made on the books of the bank, no other mode of assignment will be valid; 5th Black., 197. Courts of Equity, however, will make a distinction in such case, between the legal and equitable title. The general construction, which they have put upon provisions of this character, is, that they are designed solely for the security of the bank itself, and of purchasers without notice, and that as between the vendor and vendee, a transfer, not in conformity to such provision, is good to pass

of a *chose in action* was supported, from its supposed tendency, to encourage litigation; and with the exception of negotiable instruments, such continues to be the general rule at law, unless it has been altered by statute.[1] But Courts of Equity regard an assignment, as a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, to recover the debt, or reduce the property into possession. They are disposed to uphold and favor *bona fide* assignments. Thus, the assignment of a pecuniary legacy, charged on land, will be regarded as an assignment of money only, and therefore, not affected by a law, requiring all conveyances of interest in land to be registered. The validity of an assignment in Equity, does not at all depend upon the assent of the debtor although it may be important to give him notice of it, to preclude the possibility of any equity supervening in favor of third persons. But there are many cases at law, in which the assent of the debtor, to an assignment, is necessary to support an action. For example, where an order is drawn on a debtor for funds of the drawer in his hands, the holder cannot maintain a suit at law, against the drawee unless he accept the order.[2]

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the equitable title, and divest the vendor of all interest in the stock; 2d Cow., 777; 22d Wend., 362; 8th Pick., 90; 3rd How. S. C. R., 513. In the latter case, which is a very learned and interesting one, it was farther held, that such equitable assignment, was valid against the claims of a creditor, under an attachment subsequently issued. But it seems that in England, that either an actual transfer, or a formal notice to the company, of the assignment, is requisite, under their bankrupt laws, in order to divest the reputed ownership in the debtor, as against his assignees in bankruptcy, in case, he should become bankrupt, before any actual transfer was made; vide 2d Kent Comm., 577.

[1] Courts of law, following the rules of Equity, now take notice of assignments of choses in action, and exert themselves to afford them every support and protection, not inconsistent with the established principles and modes of proceeding, which govern tribunals acting according to the course of the common law; 1 Wheat., 233.

[2] Where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and binds it in the hands of the drawee, after notice. But where an order is drawn either on a general or a particular fund, for a part only, it does not amount to

2. What is the ground of equitable jurisdiction, in reference to assignments?

The interest of an assignee being equitable, he had, originally, no remedy at law, and could, therefore, sue the debtor at once, in Equity. The doctrine has been recently advanced, in England, that unless the assignee is prevented from using the name of the assignor, in a suit at law, he cannot be permitted to resort to an Equitable forum, to enforce his claim. The practice which prevails in this country, is entirely different; and in conformity with the general principle, that the *cestui que trust* may sue third persons in a Court of Equity, upon his equitable title, without any reference to the existence of a legal title in his trustee, which may be enforced at law.[1] Where the assignment is for the benefit of creditors, it is peculiarly within the province of Equity, to enforce the trust, from its capacity, to compel a discovery, to take an account, and to bring together all parties in interest, marshal the funds, and when necessary, direct a sale of the property.

3. What may be the subject of an assignment in Equity?[2]

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an assignment of that part, or give a lien as against the drawee, unless he consents to the appropriation, by an acceptance of the draft. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action, into many actions, without the assent of his debtor, since it may subject him to embarrassments and responsibilities, not contemplated in his original contract. He has a right to stand upon the singleness of the original undertaking, and to decline any legal or equitable assignments, by which it may be broken into fragments; 5th Wheat., 277; 20th Pick., 15.

[1] An assignee of a chose in action, must pursue his remedies in the same tribunals, in which the assignor, had no assignment been made, was bound to seek them. When obstacles growing out of the assignment, are so interposed, as to obstruct, or delay the successful prosecution of his remedies at law, then will a Court of Equity extend to him, that equitable protection, which his exigencies demand; 7th Gill and J., 114. See also, 4th Rand. R., 492.

[2] A person cannot, by any voluntary act, transfer to another, a right which he does not himself possess. And where an insolvent debtor, has made a fraudulent transfer of his property, or has discharged his own debtor from liability, for the purpose of defrauding his creditors, so

Courts of Equity will give effect to all assignments of *choses in action*, trusts, and contingent interests, whether in real or personal estate.[1] Even the naked expectancy of an heir, to his ancestor's estate, may be the subject of an assignment. So, freight to be earned in future, may be assigned. But no assignment will be upheld, which savours of maintenance or champerty. Thus, an agreement between two persons, that one should maintain a suit of the other, for a portion of the recovery, will be void. So, a naked right to overset a legal instrument, or to bring an action for a tort, cannot be assigned.[2] Where a valuable consideration has passed, and a party is put in possession of that which he might acquire without litigation, Courts of Equity will allow the assignee to stand in the shoes of the assignor. But a mere right to litigate, cannot be the subject of assignment, either at law, or in Equity. A party however, may purchase the whole or a part of the interest of another, in a contract, or claim in litigation, provided he does not undertake to pay any costs or make any advances beyond the mere support of the exclusive interest which he has so acquired.[3] Courts of Equity will not uphold an assignment, where the contract is inconsistent with public policy, or void, or illegal; such,

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that he cannot reclaim the property, or sustain a suit for it, his own assignee, under a subsequent voluntary assignment, can have no greater right. This seems to be inconsistent with the decision in 4th J. C. R., 450. But in that case, the point was not fully considered, nor the distinction adverted to, between a voluntary assignment, by the fraudulent grantor himself, and an assignment by operation of law, under the bankrupt act; 18th Paige, 218; vide also, 7th Johns. R., 161; 6 Harr. & Johns., 61.

[1] 1 Freem. R., 181. In 3rd J. J. Marshall, 13, it was held, that a right to reclaim usury was assignable in Equity.

[2] Mere personal torts, which die with the party, and do not survive, to his personal representatives, are incapable of passing by assignment; 1 Peters, 213.

[3] 3rd Sumn., 476. There is also a very learned note on this subject, by Mr. Sumner, in 3rd Vesey, 494.

for an example, as the assignment by an officer, of his commission, or of an honorary pension.[1]

4. How do Courts of Equity regard assignments by an insolvent debtor for the benefit of his creditors?[2]

A conveyance in trust to pay debt, is valid, and founded upon a valuable consideration. The right to make such a conveyance results from the absolute control which every man claims over that which is his own.[3] So, a debtor in failing circumstances, may not only dispose of his property for the benefit of his creditors, but he may prefer one to another, and assign property in trust to pay particular debts. Such assignments are revocable by the grantor, except as to creditors who have assented to the trust, and given notice thereof to the assignee. It is not necessary that creditors should become technical parties to an assignment, in order to obtain the benefit of it. Their

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[1] A future voluntary donation, or bounty from a government, is not property, and cannot be assigned in advance. If a man has his house or goods destroyed by fire, he cannot dispose, in advance of the contributions which he may receive from public charity. *A mere jus precarium*, a right resting in courtesy, is no more a matter of bargain, than the virtue from which it emanates. 4th Hill's N. Y. R., 642; 1 Peters, 193.

[2] Where an express trust is created for the benefit of creditors, without an authority to the trustee to give a preference to any, it is both at law and in equity, a trust for each of the creditors rateably. 3rd Paige's R., 517.

[3] The law tolerates voluntary assignments, giving preferences, and permits the insolvent debtor to select his own assignees; but it requires that they should be competent, and of sufficient character and pecuniary responsibility, to insure the execution of the trust, for the benefit of those interested. And where the debtor selects for his assignees, three relatives, one of whom is incapacitated by his residence, another by his blindness, and a third by his want of education, from executing the assignment, it is evidence of an intent on the part of the assignor to keep the property in his own hands, or to appropriate it for his own benefit. 1 Sand. R., 251; 8th Paiges, R., 417.

assent will be presumed, unless there is some stipulation in the deed requiring their concurrence.[1]

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[1] If the assignment be directly to the creditors, their assent must be shown, but if to trustees, for their benefit, the legal title passes to the trustees without their assent; but it must be made with the knowledge and privity of their trustees, or their creditors. The assent of the trustees is presumed, until the contrary be shown, and if the assignment be made without their knowledge, they may, when it comes to their knowledge, affirm it, and it will be binding. 10 Yerger, 146; 4 Johns, Ch., Rep., 529; 2 Gall. Rep, 557; 9 B. & Cress, 300; 1 Vent., 128; 7 Wheaton, 556; 12 Johnson, 276; Kent's Comm., 2d vol., 533; vide also 8 Leigh, R., 272.

CHAPTER XXIX.

WILLS AND TESTAMENTS.

1. JURISDICTION OF EQUITY OVER TRUSTS, CREATED BY LAST WILL AND TESTAMENT.
2. HOW EXECUTOR SHOULD PROCEED, WHERE THE PERSONS INCLUDED UNDER WORDS OF GENERAL DESCRIPTION ARE UNCERTAIN.
3. DOES THE POWER TO RAISE A SUM OF MONEY OUT OF THE RENTS AND PROFITS OF AN ESTATE, AUTHORISE A SALE.
4. PRINCIPLES OF CONSTRUCTION APPLIED BY COURTS OF EQUITY, TO BEQUESTS OF PERSONALTY.
5. WHEN COURTS OF EQUITY WILL RAISE AN IMPLIED TRUST ON RECOMMENDATORY WORDS OF A TESTATOR.

1. What are the grounds of equitable jurisdiction over trusts, created by last will and testament?

Trusts are frequently created by last wills and testaments; and are sometimes raised by legal construction, in the absence of any express declaration of the testator. These trusts fall within the exclusive jurisdiction of Equity; for Courts of Common Law, not only decline to enforce them, but even refuse to construe a will, so far as it regards mere trusts. When a trustee dies, or refuses to act, or where the will has appointed no trustee, or where it is doubtful, whether a power given to two or

more survives,[1] there would be an entire failure of justice, without the interposition of Equity. Indeed, there is hardly any case, in which it would be possible to compel the proper administration of a trust, through the forms of a Court of Law. Where real estate, for example, is charged with the payment of debts or legacies, the conflicting claims of creditors, heirs, legatees, devisees, and distributees, arising on the construction of the will, and on the right to marshal the securities, can only be settled in a Court of Equity.[2]

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[1] In the case of devises to executors, the earlier decisions established the distinction, that a devise of land to executors, to sell, passed the interest in it, but a devise that executors shall sell, or that the lands shall be sold by them, only conferred a power. This distinction was taken as early as the time of Henry VI., and it has the sanction of Littleton and Coke, and of the modern determinations; 4th Kent's Comm., 320; 7th Cow., 187; 7th Yer., 18; 4th Hill, 492; 2d Dev. and Batt., 439.

[2] The natural limits of the jurisdiction are thus described by Chancellor Walworth, 10th Paige R., 198: "A Court of Equity has jurisdiction in cases of trust; and the executor always takes the legal title to the personal estate of the testator, as a trustee. For so far as the provisions of the will are valid, he holds the property in the character of trustee, for the persons to whom it is bequeathed. And if there is any part of such property, or any interest therein, which is not legally and effectively disposed of by the will, he holds it as trustee for those who are entitled to it, under the statute of distributions. Any person claiming an interest in the personal estate of the testator, either as a legatee under the will, or under the statute of distributions, may file a bill against the executors, to settle the construction and ascertain the validity of the will, so far as complainant's interest is concerned; and to enable him to obtain from the executors, such portion of the estate, as he is legally or equitably entitled to. So, if the real estate of the testator, is devised upon distinct and independent trusts, some of which are valid, and others invalid, there is a resulting trust in favor of the heir at law, to so much of the property as is not legally and effectually disposed of by the will. The cestui que trust, in such case, may file a bill, to have his rights in the estate, settled and ascertained, and to have the trusts of the will carried into effect, so far as they are valid and effectual. And where there is a mixed trust of real and personal estate, it frequently becomes necessary for the Court to settle questions, as to the validity and effect of contingent limitations in a will, to persons who are not in esse, in order to make a final decree in the suit, and to give the proper in-

2. When is it necessary to resort to Courts of Equity to ascertain the persons entitled to take under general descriptive words ?[1]

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struction to executors and trustees, in relation to their duties. (6 Lorrilard *vs.* Coster, 5 Paige's Rep., 215; Hawley *vs.* James, Idem., 442.) But I am not aware of any case, in which an heir at law of a testator, or a devisee, who claims a mere legal estate in the real property, where there was no trust, has been allowed to come into Equity, to obtain a judicial construction of the provision of the will."

[1] "Although a different interpretation was formerly made with regard to the limitations of express trusts by will, and those of legal estates in similar instruments; upon the notion, in equity, that greater respect was due to the intention of the testator in instances of the former kind than of the latter; it appears that no such diversity of construction now prevails. But, notwithstanding, that the rules which apply in both cases are the same, it is thought desirable, from the importance of the subject, shortly to advert to the broad principles which regulate the construction of wills. Such instruments are not generally considered as definite acts, but written declarations of the testator's intention. That intention is regarded as the chief guide to the fulfilment of his will, and is to be derived from the whole context thereof, and not from any extrinsic evidence; and when the literal forms of expression differ, it is to be sought in a rational and consistent design, rather than in a purpose inconsistent and irrational. The testator is presumed to have been acquainted with the rules of law, and his intention, to be effectual, must correspond therewith, and any doubt of the propriety or prudence of his disposition, or any inference which may be drawn from the amount, or the state of his property, or any inconvenience which may have arisen in the execution of his will, or any other accidental circumstance, does not afford ground for controlling its effect, where his intention can be discovered upon the face thereof.

Technical words are not necessary, but if used are generally to be construed in the same sense appropriated to them by law. Every other word is to be received in its ordinary signification; and if possible is to operate in the construction. If the general intent can be clearly collected from the will, it is in most instances the duty of the court, to adapt every regulation thereto, and to it, if consistent with the rules of law, the punctuation, and even the grammatical construction must yield. And upon the principle of giving effect to the testator's general intent, if, on a fair inference from the whole will, there appears to have been a mistake in a particular part thereof, it will be rectified, in case the whole

It is sometimes very difficult to ascertain what persons are to take under a will; the words "children," grand children," "issue," "families," admitting of different interpretations, according to the content of the will, the circumstances in which the

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instrument cannot otherwise be interpreted; and with the same view, words inconsistent with the general intent, will be controlled in their effect, transposed or rejected, and even omissions be supplied. And indeed, wherever a particular as well as a general intent is discoverable, it is a rule that if possible, the latter shall prevail. It is, however, to be observed, that if a limitation be of that express character which at law would define a legal estate, and an intent be apparent that some restriction should be imposed which would be inconsistent therewith, the intent must give way to the express limitation. If two independent parts of a will be contradictory, and neither of them reconcileable with any general intent, the latter of them shall take effect. And if the whole will cannot have operation, it shall, subject to the above observations, avail as far as it is intelligible. But if no clear sense can be elicited therefrom, or if the intent be ascertained, but the subject, or object be uncertain, or it be doubtful in what manner the same is to take effect, the will is void. We have already hinted that extrinsic evidence is not, in general, to be resorted to as a guide in the construction of a will: and we may here remark, that this maxim is, as respects real estate, derivable from the Statutes of Wills; but that such evidence is nevertheless admissible to explain an ambiguity which arises independently of the will, and which it is necessary to remove ere the same can be carried into execution; or, in more technical language, evidence dehors the will, is not generally admissable to aid the construction, where the ambiguity is patent, but may always be resorted to for the purpose of removing a latent ambiguity." Vide Jeremy on Equity.

The construction of last wills and testaments has been considered in the following American cases: Pray et al *vs.* Belt et al; 1 Peters, 679; 3rd Peters, 346; 8th Cranch, 66; 9 Peters, 68, 461, 483, Baldwin's C. C. R., 459; 2 Brock, 285; 1 J. C. R., 251, 494; 4th Rand., 213; 1 Wash., 59; 2 A. K. Marsh., 51, 10th Yer., 444; 1 Bailey's E. R. 7, 298, 517; 3 Edw., 1; 2d Paige, 122; 6th Paige, 600; 7th Paige, 187; 3rd Porter, 11; 6th Dana, 52; 2 Watts & Serg., 450; 1 Iredell, E. R., 304, 1 Speers, E. R., 48; 26th Wend., 9; 11th Pick., 375; 13th Pick., 44; 1 Metcalf, 480; 2nd Black., 72; 12th Ohio, 390. The student will find a learned and valuable article in Bouvier's Law Dictionary, under the title "Construction," in which all the American and English authorities on the construction to be given to particular words in last wills and testaments, are cited. Vide also Sumner's note to 1 Vesey, jr. 149.

testator was placed, and the objects he had in view. It is best in all these cases, for the executor to file a bill, to ascertain the persons entitled to claim under the general descriptive words. Where the bequest respects personal or trust property, the executor or trustee cannot otherwise safely proceed. And even where the estate is of a legal nature, and the construction belonging to a Court of Law, it is most convenient to have the various questions settled in a declaratory suit, before a Court of Equity.

3. Does a power in a will, to raise money out of the rents and profits of an estate, to pay debts or portions, authorize, under any circumstances, a sale or mortgage of the estate?

The ancient rule restricted the power to the mere application of the rents and profits. But the modern authorities, in analogy to the doctrine of *cy pres*, in the case of charities, have adopted a more liberal construction. The testator is supposed to intend to raise the gross sum at all events. The rents and profits are the means which have been pointed out, and if they prove insufficient, it is presumed that the testator meant to dispense with the means, and to require that the end should at all events be accomplished.[1] The same rule is applied, where land has been charged by a testator, with the payment of his debts generally, and then devised to trustees for other purposes.

4. What principles of construction have been applied by Courts of Equity, to bequests of personalty?

The jurisdiction of Courts of Equity, over legacies, being mainly derived from the Ecclesiastical Courts, which are governed by the civil law, they have adopted a more liberal construction of the same words, in a will of personal estate, than is given to them by Courts of Law, on a will of real estate.[2] Thus, a distinction has been taken, between an executory devi-

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[1] In 6th Johns., C. R., 70, the principle is affirmed by Chancellor Kent.

[2] In a will of personal estate, a general residuary bequest carries to the legatees, not only what is not disposed of to others, but also, what is not legally disposed of, so as to pass to the persons intended as the objects of the testator's bounty. It is otherwise as to real estate. 4th Paige, 115.

se of real and of personal estate, and it has been held, that the words dying without issue, made an estate tail of real property, but, that in respect to personal property, which is transient and perishable, the testator could not have intended a general failure of issue, but issue at the death of the first taker. The Courts, according to Mr. Fearne, lay hold with avidity, on any circumstances, however slight, and create almost imperceptible shades of distinction, to support limitations over of personal estates.[1]

5. When will Courts of Equity raise an implied trust from recommendatory words of the testator?

Courts of Equity formerly went to great lengths, in considering words of this character imperative, and therefore, creating a trust; but the disposition of modern authorities, is to restrict the doctrine, and to give to the language of wills, its natural interpretation. Where the prior disposition of the property, imports absolute and uncontrollable ownership; or where there is a discretion to act or not, clearly conferred; or when the objects of the supposed trust, or the property to which it is to attach, are not certain or definite, then Courts of Equity will recognise the distinction between a power and a trust, and will not compel the execution of the former. In the case of such trusts, it is not indispensable to describe the persons who are to take by name. Any general description by which they are clearly designated, will be sufficiently certain. And the same rule will apply as to the certainty requisite in ascertaining the property bequeathed.[2]

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[1] Vide Kent's Com., vol. 4, page 281. "The American cases," says Chancellor Kent, "are disposed to lay hold of slighter circumstances in bequests of chattels, than in devises of real estate, to tie up the generality of the expression, dying without issue, and confine it to dying without issue living at the death of the party, in order to support the devise over; and this is the extent to which they have gone with the distinction." Vide Jarman on Wills, vol. 2, page 417, note, where the Editor has collected the American authorities. The cases on this subject, are also examined at large, in the American Law Magazine, vol. 2, page 88.

[2] *Falsa demonstratio non nocet, cum de corpore constat.* It may be said as a general rule, that where the name or description of a legatee is erroneous, and there is no reasonable doubt as to the person, who was intended to be named or described, the mistake will not disappoint the

Where the intention to create a trust is distinctly shown, but the objects are not denoted with sufficient clearness, the devisees or legatees in trust hold the property, for the benefit of the persons on whom the law in the absence of any disposition casts it.

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bequest; see 2 Williams' Ex'rs., (2d Am. ed.,) 835, and cases cited; 2 Younge & Coll, 72; 4 Paige, 271, S. C., 1 ed., 189; 2 Russ. & Myl., 167. The words, (members of my family,) have been considered sufficiently certain; 7 Leigh, 650. A legacy having been given to a legatee in the name which she had for many years assumed, the Court will direct an enquiry, who was the person meant; Tamlyn, 316; 1 Green'l Ev., 301; Jarman on Wills, 328, vol. 1. On the other hand, it is not essential to the validity of a devise, that all the particulars which the testator has included in his description of the subject or object of gift, should be accurate. There need only be enough of correspondence, to afford the means of identifying both. Thus, the devise of a house or field described by name, is not rendered uncertain by its being mentioned in the occupation of a person, who is not the occupier; for as the property was adequately described in the first instance, this unnecessary addition does not vitiate the devise; Jarman on Wills, vol. 1, page 328. When the words *desire*, *request*, *confidence*, *hoping*, &c., will be sufficiently imperative to create a trust, see the learned note to Lawless *vs.* Shaw, Lloyd & Gould, R., 154.

CHAPTER XXX.

ELECTION AND SATISFACTION.

1. DOCTRINE OF ELECTION AS ADMINISTERED BY COURTS OF EQUITY.
2. DEVISEE ELECTING AGAINST A WILL DOES NOT FORFEIT THE REJECTED FUND.
3. WHEN A PARTY WILL BE PUT TO HIS ELECTION.
4. RULE, WHERE THE WILL IS SO EXECUTED AS TO PASS PERSONAL BUT NOT REAL ESTATE.
5. WHAT ACTS OR CIRCUMSTANCES WILL AMOUNT TO AN ELECTION.
6. WHEN A COURT OF EQUITY WILL REQUIRE A PARTY TO MAKE AN ELECTION.
7. WHAT IS THE EQUITABLE DOCTRINE OF SATISFACTION.
8. THE APPLICATION OF THIS DOCTRINE IN THE DIFFERENT CLASSES OF CASES.

1. What is the doctrine of Election, and on what grounds is it the subject of Equitable Jurisdiction ?[1]

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[1] For a full discussion and elucidation of this subject, see Jarman on Wills, Vol. 1, American Edition; 7 Gill and J., 120; 7 Gill and Johns, 228; 1 Iredell, Eq., 247; 2 Bland, 606; 2 Johns, 178; 1 Green, Ch. 108; 2. B. Monroe, 442; 2. Williams, Ex'rs., (2d Amer. ed.) 1033, 1040; 1 Ves. (Sumner's ed.), 194: 1 Dana, R., 302; 3 Desaus, 346, 388; 1 Desaus, 497; 3 Leigh., 389; 17 Pick., 303; 6 N. Hamp., 333; 18, Maine, 42. Election may be enforced against feme couvert, and infants, between two inconsistent rights, where there is a clear intention of him,

The doctrine of election is founded upon a principle acknowledged both in law and equity, that where a donor has attached a condition to his bounty, either in express terms, or by fair implication, the donee has no right to the gift, discharged of the condition. This rule which is dictated by the clearest principles of justice, is applicable to every species of instrument. Although in its nature, a subject of concurrent jurisdiction, it is rarely that Courts of Common Law are called to adjudicate upon it. They cannot put a party to his election, but may sometimes deem him concluded from the assertion of inconsistent claims, where the alternative has been distinctly pointed out, and the acts of the party have been such as to indicate a positive election. The aid of Equity is not only indispensable when it is necessary to compel an election, but when cross equities are to be adjusted, conveyances to be decreed, or where the recompense is not of a nature to constitute a bar at law. This doctrine is most frequently applied where the testator disposes of the property of another person, but at the same time gives to that person some estate of his own, by virtue of which gift a condition is implied, either that he shall part with his own estate, or shall not take the bounty.[1] It is not extended to creditors, who claim for a valuable consideration, and *ex debito justitiæ*, and who may therefore obtain the benefit of a devise for the payment of debts, without relinquishing their interest in other funds, disposed of by the will. But it is applicable to

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under whom one of those rights is devised, that both shall not be enjoyed, and when it is against conscience to enjoy both. 1 Ired. Eq., 247. Wherever a testator may put his devisees to an election to take under, or in opposition to his will, the Court may, in such case, elect for infants—2 Bland., 606; 3 Mylne & Craig., 171; vide also 8th Paige, 325; 1 Sand., 387, 324; 9 Serg. & Rawle, 424; 4 J. C. R. 199; 8th Yerg, 194; 10th Paige, 266; 1 Freem., R., 128; 6th Shep., 42.

[2] But a devisee or legatee is not precluded from claiming derivatively through another, property which such other person has taken in opposition to the will. Thus, a man may be tenant by the courtesy, in respect of an estate of inheritance taken by his wife in opposition to a will under which he has accepted benefits, without affecting his title to those benefits. 2nd Vesey, jr., 544.

every kind of property, real or personal, and all degrees of interest, immediate or remote, vested or contingent.

2. Where a devisee, whose property has been disposed of by a testator, elects against a will, what becomes of the rejected bequest?

It would at law, fall into the general residuum of the testator's property, as undisposed of: but Courts of Equity treat the substituted devise, not as an extinguished title, but as a trust in the devisee for the benefit of the disappointed claimants to the amount of their interest. There has been much contrariety of opinion on the question whether an election induced an absolute forfeiture, or whether it simply imposed upon the renouncing party, the obligation of making compensation or its equivalent to the disappointed devisee, leaving the residuum to his own use. The weight of modern authority is in favor of the latter doctrine.

3. What is sufficient to put a party to his election ?[1]

It must clearly appear that the testator intended to impose an obligation to elect. Such an intention will be implied, whenever it is necessary to give effect to a devise. If the testator's expressions admit of being restricted to property belonging to, or disposable by him, the inference will be that he did not mean to apply them to that, over which he had no power. But the legatee will be required to make an election, although the testator proceeded on an erroneous supposition, that both the subjects of bequest were absolutely at his own disposal.

The most difficult class of cases, with which the courts have had to deal, consist of those in which the testator, and the person against whom the election is sought to be raised, have each an interest in the property; and the question is not whether the testator referred to particular tenements, but whether he intended the devise to comprise such property inclusive of the interest of his co-owner. Thus, the question has been greatly agitated, whether the testator's widow is precluded by a

[1] In 1 Ves. jr., 285, it was held, that an election to take under or in opposition to a will, can only be compelled upon something in the will, and not *dehors*. Vide also, Wigram on Interpretation of Wills, 83 Proposition VI.

benefit given her in the will, from claiming dower out of lands devised by that will. It seems to be settled that, dower being a clear legal right, in order to exclude it, the intention of the testator to that effect, must be demonstrated by express words, or manifest implication.[1] The same rule is applicable to a case, where the testator has a partial or temporary interest in the estate disposed of. There are other exceptions to the doctrine of election, standing upon a common principle; as where several benefits are conferred upon a party by a will, and it is not apparent that the testator intended to exclude him from all, unless, in every respect, he fulfilled the objects of the bill.

4. Where a will is valid to pass the personal, but not the real estate, can the heir take a bequest of personalty, without confirming the devises of the real estate?

No case of election arises unless there is an express condition to that effect annexed to the bequest of personalty.[2] But great judges have been unable to perceive any solid reason, why the doctrine should not be extended to cases, where a condition may be fairly implied.[3]

5. When will an election be presumed?

This is a question of evidence, which must be determined by

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[1] To bar the widow of her dower by implication, and to compel her to elect, where the testator has not in express terms, declared his intention on the subject, the provisions of the will, or some of them, must be absolutely inconsistent with the claim of dower; so that the intention of the testator will be defeated, as to some part of the property devised or bequeathed to others, if the widow takes her dower in addition to the provisions of the will in her favour. 10th Paige, R., 266, 1 Vesey, jr., 333; Jarman on Wills, vol. 1, page 396, where all the English and American cases are cited. Brown's Ch. R., Am. Ed., Vol, 1, p. 293.

[2] This doctrine has been recognized in Mississippi. 1 Freman, R., 133.

[3] A person having provided for the objects of his bounty by deed, reserving certain rents to their use, which he afterwards received himself, and ultimately provided for them in his will, giving for reason, that the deeds were inoperative; which opinion as to deeds was a mistake; yet the whole forms a case of election, and the legatees cannot take under both; 3rd Desaus, 504.

the circumstances of each case. No positive acceptance or renunciation is necessary. Where a party labors under no legal incompetency, and is fully cognizant of his rights, he will generally be concluded by any acts, which clearly indicate his intention to make an election.

6. When will a Court of Equity compel a party to elect?

It will only do so, under circumstances which enable him to make an intelligent and deliberate choice; and for that purpose he may maintain a bill in Equity, for a discovery, and have all the necessary accounts taken to ascertain the real state of the funds.

7. What is the equitable doctrine of satisfaction?[1]

Satisfaction in Equity is defined, as the donation of a thing, with an express or implied intention, that it is to be an extinguishment of some existing right or claim of the donee. It most usually arises in Courts of Equity, as a matter of presumption, where a man being under an obligation to do an act, (as to pay money,) does that by will, which is capable of being considered as a performance or satisfaction. In such cases, the donation is held to be a satisfaction, unless that conclusion is repelled by the nature of the gift, the terms of the will, or the attendant circumstances. This presumption may be rebutted by intrinsic evidence, arising on the face of the will, or by extrinsic testimony. If the donation given by the will, is different in specie from that to which the donee is entitled, or if it is less beneficial in amount, certainty, time of enjoyment, value, or otherwise, the presumption does not arise. There is a distinction between the performance and the satisfaction of a covenant. Satisfaction supposes an intention to substitute something different from the contract, in its place. With respect to performance, the question is, has that identical act, which the

[1] See Williams, Executors, 929; note (a) to 2 v. 463; 2 Roper, Legacies, by White, chap. 17, § 2; Lowndes, 313; Ward, 248; Preston, 339; 1 H. & G., 484; 6 Rand., 176; 1 Dessaus., 314; 4 Dessaus., 614; 2 Sim. & S., 424; 1 McClel. & Y., 41; 1 Swans., 219; 1 Mc C. & Young, 345; 2 Harr. & J., 63; 2 Gill & J., 185; 6 Cowen, 246; 12 Mass., 391; 2 H. & Munf., 381; 2 Ib., 413; 2 Dessaus., 295; 3 Dessaus., 504; 3 Serg. & R., 54; 5 Rand., 577; 3 Wash. C. C. R., 48; 2 Dev. & Batt., 66; 1 B. Munroe, 230; 1 Green Chy., 1.

party contracted to do, been done? The only practical importance of the distinction, arises from the disposition of the Courts to recognise a performance *pro tanto*, in cases, in which a satisfaction *pro tanto*, would not be presumed. This doctrine of satisfaction rests upon no solid principle, and the disposition of the modern authorities is to contract and not enlarge the sphere of its operation

8. In what cases, and with what discriminations, is this doctrine applied?

Questions of satisfaction, arise in three classes of cases, which are governed by somewhat different principles; (1) where a portion has been previously secured to the donee, by a marriage settlement; (2) where the donee has received from the testator an advancement, after the execution of the will; (3) where the legatee is a creditor. In the first class of cases, the presumption of Equity, is against double portions, and where a provision has been already made in one instrument, the repetition of it in another, is supposed to be intended as a substitution for the first, and not an addition to it. This presumption proceeds upon the technical notion, that a portion given by a father to a child, is a debt, and a man cannot be supposed to intend to pay the same debt twice. The rule is only applicable, where the last provision is *ejusdem generis*, and equally beneficial with the first. But where the legacy is simply less in amount, than the provision, or payable at a different period, it is to be taken as a satisfaction, *pro tanto*, and some of the cases hold it to be immaterial, whether the gift is of a particular legacy, or of a residue. In the second class of cases, an advancement will be presumed, under similar circumstances, to be an ademption, or a satisfaction *pro tanto*, of the legacy; and Lord Brougham has said, that "the Court will not weigh in golden scales, the provisions made, and determine against ademption, merely, because the two differ somewhat in amount, or even in kind."[1] Where the legacy is

[1] In 5th Myl. & Craig., 29, Lord Cottenham says, alluding to what had been supposed to be the rule, that an advancement would be a complete ademption, though less than the testamentary portion: "A father who makes his will, dividing his property among his children, must be supposed to have decided what, under the then existing circumstances, ought to be the portion of each child, not with reference to the wants of

of a residue, which is always changing, no fair presumption can arise of its being intended as a satisfaction or ademption. And this doctrine is farther confined to the case of a parent, or a person standing in *loco parentis*. All persons are treated in legal contemplation, as strangers to the testator, except legitimate children, even grandchildren, unless it can be shown that he has assumed the office of a parent, and placed himself in *loco parentis*, to the donee. The doctrine leads to this extraordinary conclusion, that a subsequent advancement will adeem a legacy given to a child, but not one given to a stranger. So, in the remaining class of cases, the general rule is, that where a debtor bequeaths to his creditor, a legacy equal in value and amount to the debt, the legacy will be presumed, in the absence of any intimation of a contrary intention, to have been given in satisfaction of the debt.[1] But the doctrine has so little foundation in

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each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess. If, subsequently, upon the marriage of any one of them, it becomes necessary or expedient to advance a portion for such a child, what reason is there for assuming that the apportionment between all ought therefore to be disturbed? The advancement must naturally be supposed to be of the particular child's portion; and so the rule assumes, as it precludes the child advanced, from claiming the sum given by the will as well as the sum advanced. So far, the rule is founded on good sense, and adapted to the ordinary transactions of mankind. The supplying the wants of one child for an advancement, is not permitted to lessen or destroy the provisions made for the others, by giving both provisions to the child advanced; but the supposed rule, that the larger legacy is to be adeemed by the smaller provision, appears to me, not to be founded on good sense, and not to be adapted to the ordinary transactions of mankind, and to be subversive of the obvious intention of the parent."

[1] A legacy is not to be deemed payment or satisfaction, 1. where it is less than the amount of the debt; 1 Ves. sen., 263; Mosl., 295; 3 Br., 133; 2 Ves., 478; Pr. Ch., 236. 2. Where, though equal to the debt, there is a difference in the duration or time of payment, making it less beneficial to the legatee, Prec., Ch.; 236; 2 Vern., 504; 2 Atk., 300; 2 Ves., sen., 655; 3 Atk., 96; 1 Br. C. C., 129; 18 W., 324; 1 Br. Ch. C., 295; 1 M. & Y., 41; 1 Swanst., (219.) 3d. Where the legacy and the debt are of a different nature; 3 Russ., 149; 2 P. W., 614; 2 Ves., jr., 463; Prec., Ch., 175; Mos., 384; 2 Vesey, sen., 37; 1 Cox Ch., 6, 49; Prec. Ch., 228. 4th. Where the provisions of the will are expressed to be

reason or justice, that the Court, will lay hold of slight circumstances, to take a case out of its operation.

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given for a particular purpose; 2 Ves., sen., 655; 4 Ves., 362; 3 Br. Ch., 192; 1 P. W., 408. 5th. Where the debt is contracted subsequently to the making of the will; 2 Salk., 508; 2 P. W., 343; 3 P. W., 358. 6th. Where the legacy is contingent or uncertain; 2 Atk., 300; 2 Ves., 38; 2 P. W., 552; 1 Ves., jr., 298; 5 Ves., 79; 1 Cox C., 188; Prec. Ch. Edley, French in notes; 10 Ves., 1; 1 Ves., 519; 2 Vern., 297; 1 B. Ch. C., 129; B. Ans., 830; 1 M. & Y., 41. 7th. Where the debt is contingent; 1 P. W., 296; 2 Salk., 508; 3 Ves., jr., 561. 8th. Where there is an express direction in the will, for the payment of debts and legacies; 1 P. W., 408; 3 Atk., 64; Dicken., 243; but see pr. 4 Madd., 331. 9th. And *perhaps*, where the legatee is a servant of the testator and the debt is for wages; 3 Atk., 64; 11 Ves., 542; 1 P. W., 296; 3 Ves., jr., 561; But vide, 2 Ves., sen., 635; 1 P. W., 408. The Court will lay hold of any circumstance, however trifling, to raise a presumption that the testator did not intend the legacy as a satisfaction; Price Ch., 314; 2 Ves., sen., 636; 3 Ves., 516; Williams on Exr's., 805. But it is said that a legacy shall, in all cases, be deemed a satisfaction, where there is a deficiency of assets; Toller, 337; 2 Williams, 808. These authorities are thus classified by Mr. Rand, in a learned note to 12th Mass., 406.

CHAPTER XXXI.

APPLICATION OF PURCHASE MONEY.

1. WHEN PURCHASERS ARE BOUND TO LOOK TO THE APPLICATION OF THE PURCHASE MONEY.

1. When do Courts of Equity hold purchasers bound to look to the application of the purchase money?[1]

Courts of Equity, on their favorite principle of protecting the interests of the *cestui que trust*, or beneficiary, have made it the duty of purchasers of a trust subject, under certain circumstances, to see that the purchase money is applied to the purposes of the trust. This duty is not imposed, unless the trust is of a defined, and limited nature, nor where the trustee is invested with a discretion as to the future appropriation of the purchase money. Thus, the purchaser from an executor of personal property, is not bound to look to the application of the purchase money; for the personal estate is a fund in his hands, for the payment of debts generally. And it is immaterial, that the personal estate sold, is, within the knowedge of the purchaser, (provided, he is guiltless of any fraud,) the subject of a specific bequest; for otherwise, no one could purchase an estate specifically bequeathed, without first coming into Equity, and having an account taken of the assets of the testator, that it might be as-

[1] 8th Wheaton, 421; 2nd Brock., 185; 3rd Mason, 179; 7th Johns., 155; 2nd Gill & J., 86; 2 Desaus., 375.

certained whether it was necessary for the executor to sell. The same rule is applied, where the real estate is charged with the payment of debts generally; even where more is sold than is sufficient to satisfy the purposes of the trust. But it is different, when real estate is charged with the payment of a legacy, or a specified debt. It is to be observed, however, that any transaction may be vitiated by fraud, and a purchaser colluding with an executor, in the misapplication of assets, or in a breach of trust, as to the sale or mortgage of real estate, can claim no protection from a Court of Equity.[1]

[1] When a trust to sell and raise money is created by the parties, and expressed in a deed, through which the purchaser traces his title, and in which the object of the trust is defined, he will be required in Equity, to look to the application of the purchase money; but where the law itself creates a trust, or confers an authority to execute a trust, it imposes upon the purchaser no obligation to apply the money, further than to pay it to the trustees; 7th Ohio Rep., part 1st 21.

CHAPTER XXXII.

CHARITIES.

1. THE JURISDICTION OF EQUITY OVER CHARITIES PRIOR TO THE STATUTE OF 43RD ELIZABETH.
2. WHAT ARE CHARITABLE USES.
3. CHARITIES ARE FAVORED IN EQUITY.
4. EXTENT TO WHICH THE DOCTRINE OF CY PRES IS AT PRESENT CARRIED IN ENGLAND.
5. DIVERSION OF A TRUST FOR RELIGIOUS PURPOSES, FROM OBJECTS CONTEMPLATED BY DONOR.
6. JURISDICTION OF EQUITY TO ENFORCE CHARITABLE BEQUESTS ABROAD.

1. Had Courts of Equity jurisdiction over charities, prior to the statute of 43rd Elizabeth?[1]

The true solution of this question is involved in much obscurity, and has given rise to a great diversity of judicial opinion. Judge Story, after an elaborate review of the authorities, thinks it, the sounder doctrine, that where no trust is inter-

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[1] Judge Story confines his examination of this important subject almost exclusively to the English decisions. The number and learning of the American cases, the different principles, which they have adopted, arising out of the difference in our institutions, and the growing interest and importance of the subject have induced the author to devote a comparatively large space to the notes on this chapter.

posed, or where there is no person in esse capable of taking, or where the charity is of an indefinite nature, the jurisdiction is not to be referred to the general jurisdiction of the Court, but sprung up after the statute of Elizabeth, and rests mainly upon its provisions.[1] It seems to be established, that since that statute, the Court will not establish any trust for indefinite purposes of a benevolent nature, not charitable within its purview,

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[1] In the case of Vidal et al *vs.* Girard's Executors, 2nd How, S. C. R., 128, this subject was examined with great learning, and Judge Story, after reviewing the former cases, uses the following language, inconsistent with the statements of the text.

"But very strong additional light has been thrown upon this subject by the recent publications of the Commissioners of the Public Records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. In these are found many cases in which the Court of Chancery obtained jurisdiction over charities long before the statute of Queen Elizabeth; and some fifty of these cases extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced n the Court of Chancery. In some of these cases, the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, there were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject, when the case of the Trustees of the Philadelphia Baptist Association *vs.* Hart's Executors, 4 Wheat., 1, was before this court, (1819,) those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded." It is presumed, that the doctrine declared in this case, by so eminent a jurist, after a discussion unrivalled for its learning and ability, will settle the law in our own country. It is sustained by the weight of English and American authority. Vide 2d Kent's Comm., 288, where the cases are cited, and 1 Sand. Rep., 440. The statute of Elizabeth is in force in North Carolina and Kentucky, and the principles adopted under it, by the English Court of Chancery, form a part of the common law of Pennsylvania and Massachusetts.

although there is an existing trustee, in whom they are vested; but will declare the trust void, and distribute the property among the next of kin. But in virtue of their general jurisdiction over trusts, Courts of Chancery will enforce the due performance of charitable bequests, where the charity is definite in its objects, is lawful, and is to be executed and regulated by trustees, whether private individuals, or corporations, specially appointed for that purpose. If the trustees of such a charity should grossly abuse their trust, a Court of Equity may commit the administration of it to other hands.

2. What are charitable uses ?[1]

Charity has been defined to be a general public use, which extends to the rich as well as to the poor. A number of objects are declared to be charitable by the statute of Elizabeth, already referred to: such as schools, hospitals, houses of correction, the building of churches, bridges, &c.; and the equity of the statute it has been decided, includes all cases within its spirit, and intendment. It does not, however, embrace any superstitious uses, such as prayers for the dead; nor any bequests for purposes of benevolence so general and undefined as to be incapable of being executed by the Court.[2]

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[1] This subject has been considered in the following American cases: Gass *vs.* Wilkite, 2 Dana, 170; Witman *vs.* Lex., 19 Serg. & R., 88; Mayor, &c., of Philadelphia, *vs.* Elliott, 3 Rawle, 170; McGinn *vs.* Aaron, 1 Pennsylvania, 49. Brewers *vs.* Forman, Addis., 362; Trustees of Bishop's Fund *vs.* Eagle Bank, 7 Conn., 476; the American Asylum *vs.* the Phœnix Bank, 4 Conn., 172; Coggeshall *vs.* Pelton, 7 John, Ch. 292; Going *vs.* Emory, 16 Pick., 107; Bartlett *vs.* King, 12 Mass., 537; Burbank *vs.* Whitney, 24 Pick., 146; Bartlett *vs.* Nye, 4 Metcalf, 378; Burr *vs.* Smith, 7 Vermont, 241; Gallego *vs.* Attorney General, 3rd Leigh, 450; Sanderson, *vs.* White, 18 Pick., 328; Moore's heirs *vs.* Moore's devisees, 4 Dana, 363; Potter *vs.* Chapin, 6th Paige, 639.

[2] A very interesting question was raised in the case of Vidal et al *vs.* Girard's Executors. It was contended that the exclusion of all ecclesiastics from holding or exercising any station or duty in a college, or even from visiting it, was derogatory to the Christian religion, that it in fact amounted to founding a school upon the principles of infidelity, and was, therefore, no charity. Judge Story in replying to this argument, uses the following language:

3. How are charities favored by Courts of Equity ?[1]

Public charities are public blessings, and the State is inter-

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"In the present case, there is no pretence to say, that any positive or express provisions impugning Christianity, exist, or are even shadowed forth in the will. The testator does not say that Christianity shall not be taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer, or visitor in the college, what legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance.

But it is asked, why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. "In making the restriction," says he, "I do not mean to cast any reflection upon any sect or person whatsoever. But as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce." Here, then, we have the reason given; and the question is not, whether it is satisfactory to us or not; nor whether the history of religion does or does not justify such a sweeping statement; but the question is, whether the exclusion be not such as the testator had a right, consistently with the laws of Pennsylvania, to maintain, upon his own notions of religious instruction. Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void upon that account? Suppose he had excluded all lawyers, or all physicians, or all merchants from being instructors or visitors, would the prohibition have been fatal to the bequest? The truth is, that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country, as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty.

But the objection itself assumes the proposition that Christianity is not to be taught, because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not laymen instruct in the general principles of Christianity as well as ecclesiastics? There is no restriction as to the religious opinions of the instructors and officers. They may be, and doubtless, under the auspices of the city government, they will always

ested in giving force and effect to them. They have, therefore, received a more liberal construction than the law allows on bequests to individuals. Where the donor has a capacity, and a disposable estate, and his donation does not contravene any public policy, the Court will supply all defects of conveyances.[1] If the bequest is for charity, it matters not how uncertain the persons or the objects may be; or whether the persons who are to take, are in *esse* or not; or whether the bequest can be carried into exact execution or not: in all these, and the like cases, the Court will sustain the legacy, and give it effect according to its own principles. And where a literal execution becomes inexpedient or impracticable, the Court will execute it, as nearly as it can, according to the original purpose, or *cy pres*. At an early period, Courts of Equity even held the assets of a testator bound to satisfy charitable uses, before debts or legacies. But the more equitable doctrine now prevails, that on a deficiency of assets, charitable legacies shall abate in proportion as pecuniary legacies. Charities are still farther favored, by not allowing the bar from the lapse of time or the Statute of Limitations to preclude their assertion to the same extent as in the case of private trusts.

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be, men, not only distinguished for learning and talent, but for piety and elevated virtue, and holy lives and characters. And we cannot overlook the blessings, which such men by their conduct, as well as their instructions may, nay *must* impart to their youthful pupils."

[1] A gift to a charity will not be permitted to fail for want of a trustee, but it will vest, as soon as the charity has acquired a capacity to take. 1 Penn., 49; 3rd Peters., 114; 9th Cranch., 332; 10 Pick., 452; 1 Green, 271; 9 Mass., 44; 10 Mass., 97; 2d Peters, 566; 9 Cowen, 484. Dedications of land to charitable and religious purposes are valid without any grantee, to whom the fee could be conveyed; 6th Peters, 435. The same principle is affirmed in 9th Ohio, 203, in the case of the Trustees of of the McIntire Poor School *vs.* the Zanesville Canal and Manufacturing Company, where the learning on this subject was thoroughly explored in the arguments of counsel. See Perkins' & Metcalf's Digest—Title, "Charitable Uses."

4. How is the doctrine of *cy pres* applied at present in England ?[1]

The Courts have receded from the extravagant length to which the doctrine was formerly pushed. They will not de-

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[1] This doctrine of executing the general intent of a testator, cy pres in case of charities has been fully examined in several cases in the United States, with different degrees of approbation and adoption. The doctrine of the English Court of Chancery is much broader than any which has been inculcated in America.

The following remarks of Chief Justice Robertson, taken from 4 Dana., 355, are suppposed to describe the extent to which the doctrine would be carried in this country:—

"In England the Chancellor may act on charities by virtue of the king's prerogative. The prerogative cases in England are not judicial. We are satisfied that the cy pres doctrine of England is not, or should not be a judicial doctrine except in one kind of cases; and that is, where there is an available charity to an identified or ascertainable object, and a particular mode inadequate, or illegal, or which happens to fail, has been prescribed. In such a case a Court of Equity may substitute any other mode, that will be lawful or suitable, and will effectuate the declared intention of the donor, and not arbitrarily declare an object for him." Vide also 7th Ohio, part 1, 217; and 14th Wend., 265. The doctrine does not prevail at all in North Carolina, and if the intention of a testator in respect to a charity for religious purposes cannot be literally fulfilled, a trust results to the heir or next of kin. 1 Dev. & Bat., N. C., Equity cases, 276. To the same effect is the decision of the Court of Appeals of Virginia, in 3rd Leigh, 450. Judge Tucker in that case thus exposes the arbitrary nature of the doctrine:

"The principle of administering charities, cy pres, is utterly without foundation in reason or justice, unless it can be traced to some imperative command, or ample authority conferred by the supreme power. Does it not strike the most common understanding as an invasion of right, to give an estate which is devised to a Roman Catholic charity, to a charity of the Church of England, on the principle, that the first, was void at law, and the next is cy pres the testator's intention, when nothing in the world could have been farther from his intention? In the case for instance, of the Attorney General *vs.* Baxter, 1 Vern., 248; A. by will gave £600 to Mr. Baxter, to be distributed among sixty ejected ministers, and £20, to be laid out in his book, entitled Baxter's Call to the Unconverted. He and the sixty poor ejected ministers were nonconformists, and for that reason, most probably, the objects of the testator's bounty. Yet, because they were non-conformists, the use was

cree the execution of a trust of charity, in a manner different from that which was intended, except so far as the intention cannot be literally fulfilled. Where the testator manifests a general intention to give to charity, the failure of the particular mode which he has specified, will not be permitted to defeat the charity. But where it is apparent that the testator had only one particular object in view, which can not be effected, the trust fails, and the next of kin will take. Where there are no objects remaining to take the benefit of a charitable corporation, the Court will dispose of its revenues by a new scheme, upon the principle of the original charities, *cy pres*. Where the revenues of a charity increase to an extent, beyond the original objects, the general rule is, that they are to be applied to the augmentation of the benefits of the charity, or to similar purposes.

5. Where property is given for religious purposes, do Courts of Equity consider it an implied condition, that the opinions of the donor should always be taught ?[1]

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declared *void* as to them, but it was said, that the money being given for religious charity, must be disposed of in charity, and that this being intended for ejected ministers, ought to go amongst the clergy; whereupon it was decreed to go to maintain a chaplain (a conformist) in Chelsea Hospital. And this upon the doctrine of cy pres, though it is obvious that the non-conforming testator never could have intended such a disposition of his estate. Though this decision was reversed, it shows the spirit in which the statute was administered.' The American cases are cited in Jarman on Wills, and Kent's Commentaries.

[1] The question raised in the text, is of the greatest practical importance, and the following extracts from the eloquent opinion of the Vice Chancellor in 1 Sand. Rep., 440, cannot fail to be interesting and instructive to the student, especially as a different doctrine is maintained, from that which is intimated by Judge Story. "The jurisdiction of Courts of Equity, in cases of charities directed to religious purposes, proceeds upon the ground of a trust. In such charities, as well as in those for purposes purely civil, it is the duty of the Courts to give effect to the intent of the founder, if that be legal. To that end, their aim is to ascertain the scope and objects of the charity, and then to enforce its proper and faithful administration. The difficulties which environ the subject of religious charities, arising from the lapse of time, since the

This doctrine has been advanced by high authority, but it may well be questioned. It is founded upon the presumption,

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foundation, and from the subtleties involved in the alleged perversion of the trust, are not permitted to prevent the proper exercise of this jurisdiction. The argument that a majority for the time being, can mould to their own notions, the principles sustained by the gifts of the founders of the charity, and can substitute other principles or cardinal doctrines in their stead cannot be tolerated for a moment. It strikes at the root of all religious, charitable, and even literary gifts and bequests, which are to endure beyond the lives of those first intrusted with their administration. It closes the avenues of benevolence, and chills the warm heart of charity; of that good will towards men which seeks to perpetuate by the means bountifully conferred on the donor, the good works which the approach of his appointed time on earth, prevents him from accomplishing or perfecting in person. Let it once be understood to be the law of the land, that funds bestowed for the maintenance of a Protestant Church, may, with the change of faith of the members, be applied to the support of the Roman Catholic forms of worship and religious doctrines; or that a devise for the support of disabled seamen, may, in the wisdom of trustees for the time being, be used to educate young mariners for the better discharge of their duties; and we shall hear no more of the munificent eleemosynary donations, which so much distinguish and adorn our country. No Randall will endow another noble charity for the worn out sons of the ocean. No Warren or Rogers will bestow her property, to build churches for the ministration of the Gospel to the poor and needy of our populous cities. A more just and righteous principle animates our law. "When a gift of property is made, for the service and worship of Almighty God, the thing to be regarded is, what were the religious tenets in general of the donors. Because it would not be a just application of those trust funds, if they were employed for the sustentation of religious opinions which the donors themselves would have disavowed." (Per Vice-Chancellor Shadwell in Attorney General *vs.* Pearson, 7 Simons, 306.) Where a trust is created by deed, for the use of a congregation of Christians, designating such congregation by the name of a sect or denomination, without any other specification of the religious worship intended, the intent of the donors or founders in that respect, may be implied from their own religious tenets, and from the prior and cotemporary usage and doctrines of the sect or denomination to which such congregation belongs. In ascertaining the early and cotemporary usage and doctrines of such a sect, resort may be had to history, and to standard works of theology of an era prior to the existence of the dispute or controversy. When it is shown what such prior usage and doctrines were, it is incumbent on

that a donor could never intend any other opinions to be taught than those which he professed; a presumption which may not

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those who allege a departure therefrom in the founders of the particular congregation, or the donors of its temporalities, to prove such departure. Where a church is endowed with property for the support of a particular faith, and is subsequently incorporated, it is not competent for a majority of the church, the congregation, or the corporators, or of a majority of each combined, to appropriate such property for the maintenance of a different faith. The question of the particular religious faith or belief is not material in such cases, except so far as the Court is called upon to execute the trust, and to that end it merely inquires what was the faith or belief, to maintain which the fund was bestowed. The Court does not animadvert upon the religious belief of either party, or assume to determine that either is in itself, right or wrong."

In Gable and others *vs.* Miller and others, 10 Paige's Rep., the Chancellor held, "That the Court of Chancery has jurisdiction to prevent a diversion of the temporalities of a church from the purposes for which they were devoted by the donors; and to require them to be appropriated to the support of that form of worship, and to the teaching of those doctrines, for which they were originally intended." The same principle is affirmed in 9th Wend., 395; 7th Serj. & Rawle, Rep., 539; 1 B. Munroe, 215; 7th Halst. Rep., 205.

When however, no trust is involved, the right of a religious society to hold property, which they have acquired by purchase, notwithstanding any departure by a majority of the members from their original faith, has been repeatedly asserted. Thus, in 3 Paige's R., 304, the Chancellor says:—

"I confess I have always entertained serious doubts, whether any civil tribunal in this State, could interfere to prevent the majority of corporators in a religious society, from introducing such changes in the doctrines or modes of worship in their churches, as they might deem expedient; and which they could introduce through their trustees, elected in the manner prescribed by law. For myself, although my opinions are fixed and settled, as to the essential doctrines of Christianity as taught in the church to which I belong, I am unwilling, as a civil judge, to assume the responsibility of deciding upon the correctness of the religious tenets of others, either in matters of faith or otherwise. Neither am I prepared to say that it would be right or expedient, to adopt the principle of Lord Eldon, in the case from Merivale, here, where all religions are not only tolerated, but are entitled to equal protection by the principles of the Constitution. Upon Lord Eldon's principle, a society of infidels, who had erected a temple to the goddess of reason, could not,

always be consistent with truth, and the recognition of which would be inconsistent with public policy.

6. Will a Court of Chancery enforce a charitable bequest for foreign objects?[1]

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upon the conversion of nine-tenths of the society to Christianity, be permitted to hear the word of life in that place where infidelity and error had once been taught. And upon the same principle, the newly created Equity Jurisdiction in a neighboring State might find itself constrained to order some of the parishes within its limits, to employ religious teachers who should inculcate the doctrine of whitchcraft as it was taught in the same churches, at the time of their first organization." The authority of this case is very much weakened by the remarks of the Chancellor, in Gable *vs.* Miller, which was subsequently decided. In 1 Dev. E. R., 453, Judge Hall intimates that the majority of the corporation must govern in the use and disposition of property held by it absolutely; and declares his opinion that it is not for the Court to decide whether the parties or church have strayed from the true faith, or introduced errors into the church government; and that it might be more than difficult to qualify any earthly tribunal to decide it. And in Keyser et al *vs.* Stansifer et al, 6 Ohio R., 363, the Court held, that where a religious society purchase land, the majority of the society have a right to control its use and occupation; and of which they cannot be deprived by subsequent lapse into any supposed error of doctrine. In delivering this opinion, Judge Lane used the following language: "It does not follow that they lose their property by ceasing to entertain certain opinions. The declaration of faith under which they were organised, contains no attempt to bind them to abide in the same belief. It is shown, in proof, that each Baptist church is in itself a whole, separate and independent, at liberty to form its own creed, and looking to others for counsel and social intercourse only. The opinions of such a body cannot but change. To fix their fleeting wherries; to anchor them immoveably in the stream of time; is beyond human power; for the mind at least is free; ranging by its inherent strength through the boundless fields of knowledge, moulding its belief according to the apprehension of the truth, and incapable of fixedness until the great day when all truth shall be made known. And if it were possible, it were wrong; to limit activity of mind, is to set boundaries to human knowledge."

[1] The following points connected with charities and corporations for religious purposes, have been adjudicated.

1. In Harper et al *vs.* Crawford et al, 13 Ohio R., 129, it was held, that trustees of a religious society, who hold an estate at law, cannot maintain a suit in Chancery to establish such title, against defendants

It will, unless they violate the public policy, or laws of its own jurisdiction. Where the trustees are amenable to its process, a Court of Chancery will secure the fund, and direct its

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who claim a better title to the same property, as the lawful trustees of the same society. They must manifest their title by suit at law.

2. A Court of Equity cannot take cognizance of acts of forfeiture; nor remove members, nor pronounce a dissolution of the corporation for a breach of the franchises, conferred by the charter, yet where a corporation has been made the depository of trusts, civil or eleemosynary, and property has been invested in its hands as a trustee, a Court of Chancery may exercise jurisdiction over such corporate trusts, in the same manner, and with like power, as over other trust estates; 1 B. Munroe R., 217; vide also, 4 Wheat. Rep., 518; 6 Conn., 532.

3. Where the trustees of a charity, have through real mistake, and without any corrupt motive, misapplied the funds under their care, their conduct will be considered in a lenient disposition, if not in a favorable light. The circumstance of the trustees being a corporate body, should rather increase the disposition towards a lenient construction of their proceedings, and, although in contemplation of law, the identity of the body is preserved through ages, yet misdeeds alleged to have been committed long gone by, are only to be visited upon those of the present generation, where there exists no doubt of the misfeasance. But where this is clear, it is of no consequence that the individuals now sustaining the corporate character, enjoying the immunities, and exercising the functions of the corporation, are wholly different from those who did the wrong, or who permitted the neglect, and are only connected with them through the medium of a common municipal character. This is the condition inseparably annexed to their corporate existence, and by which the individuality of the body politic with all its incidents, is perfectly maintained; 3rd Mylne & Reen, 647; 3rd Russ., 397.

4. In England, the King, by virtue of his prerogative, and the Chancellor, by virtue of his power, delegated to him by the crown, was the visitor and superintendant of all eleemosynary corporations, where no other person had the right; and since the 43rd Eliz., as that statute has been construed, the power is greatly enlarged. It extends to cases, 1st. Where a general purpose of charity is manifested, without designating its object or mode of administration; 2nd. To cases in which there is a definite object, or a peculiar mode of applying it, and either has failed; 3rd. Where the fund is more than adequate. In all such cases, the Chancellor, (by the application of the civil law doctrine of cy pres,) will not only support the charitable intention, but will apply it to some kindred object of charity. (Moore's heirs *vs.* Moore's devisees, 4 Dana, 359.) In this country, the legislature or government of the State, has

administration. But if the charity is to be established abroad, and executed by persons living there, the Court will simply order the money to be paid over to those entitled, and leave the future control of the charity to the local tribunals.

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the right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is intrusted with it. The jurisdiction vested by the Statute of Elizabeth, over charitable uses, is said to be personally in the Chancellor, and does not belong to his ordinary, or extraordinary jurisdiction in Chancery; Kent Com., vol. 4, page 509; 1 B. Munroe's Rep., 220.

5. The proper Courts in this country will interfere to prevent an abuse of the trusts, confided to British corporations, holding land here to charitable uses, and will aid in enforcing the due execution of the trusts, but neither those Courts, nor the local legislatures, where the lands lie, can adjudge a forfeiture of the franchises of the corporation, or of its property; 8th Wheat., 464.

CHAPTER XXXIII.

IMPLIED TRUSTS.

1. WHAT IS A RESULTING TRUST.
2. WHEN AN IMPLIED TRUST IS RAISED ON AN EXPRESS TRUST.
3. IMPLIED TRUSTS ON A CONVEYANCE, IN WHICH NO URE OR CONSIDERATION IS EXPRESSED.
4. IMPLIED TRUST ON THE PURCHASE OF REAL ESTATE BY ONE MAN WITH THE MONEY OF ANOTHER.
5. EXCEPTIONS TO THE DOCTRINE OF A RESULTING TRUST.
6. EXECUTOR DOES NOT TAKE THE RESIDUUM OF THE PERSONAL ESTATE IN AMERICA.
7. DOCTRINE OF THE EQUITABLE CONVERSION OF PROPERTY.
8. WHAT ARE LIENS AND HOW REGARDED IN EQUITY.
9. LIENS IMPLIED ON THE SALE OF REAL ESTATE.
10. EQUITABLE LIEN FOR REPAIRS AND IMPROVEMENTS OF PROPERTY BELONGING TO ANOTHER PERSON.
11. IMPLIED TRUSTS ARISING FROM POSSESSION OF THE TRUST SUBJECT.
12. TRUSTS FORCED UPON THE CONSCIENCE OF A PARTY IN INVITUM, BY OPERATION OF LAW.
13. DUTIES AND RESPONSIBILITIES OF TRUSTEES.
14. JURISDICTION OF EQUITY OVER FOREIGN TRUSTS.

1. What is a resulting Trust?

The law will sometimes raise or imply a trust, for the pur-

pose of effectuating the intention of the parties, or of preventing fraud, where it is not created in express terms. But it must be consistent with a fair and reasonable construction of the acts of the parties. These trusts are mere legal implications, not embraced within the provisions of the Statute of Frauds,[1] liable to be rebutted by parol testimony, and only binding upon purchasers who have actual notice of them.[3]

2. When does the law raise an implied trust on an instrument creating an express trust?[4]

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[1] The Statute of Frauds does not include trusts which arise by the mere operation of law. These may be proved by parol evidence; 2nd Black., 198; 3rd Hay, 57; 1 McChord's Ch. 119; 4th Desau, 486; 1 J. J. Marshall, 403. And the exception in the Statute of Frauds, is deemed merely affirmative of the general law, and not as creating a saving of resulting trusts, which would have otherwise been cut off, unless in writing. 1 Sumner's Rep., 187. "As that statute," says Mr. Lewin in his Treatise on Trusts and Trustees, "was directed against frauds and perjuries, it is obvious that resulting trusts were not within the mischiefs to be remedied. The aim of the legislature was, not to disturb such trusts, as were raised by maxims of Equity, and so could not open a door to fraud or perjury, but by requiring the creation of trusts by parties, to be manifested in writing, to prevent that fraud and perjury, to which the admission of parol testimony had hitherto given occasion. And the enactment itself is only applicable to this view of the subject: for the legislature could scarcely direct that "all declarations or creations of trusts should be manifested and proved," unless the trusts were in their nature capable of manifestation and proof; but as resulting trusts are the effect of a rule of law, to prove them would be to instruct the Court in its own principles, to certify to the judge how Equity itself operates."

[2] The American cases are cited in Kent's Commentaries, vol. 4, page 305. Vide also 2nd Wash., C. C. R., and 2nd Story's C. C. R., 1.

[3] 4 Watts & Serg. Rep., 102; 3rd J. J. Marsh., 558. Another important principle is, that if a trustee by implication is to be affected by an Equity, that Equity must be pursued within a reasonable time. 4 J. C. R., 310.

[4] Where all the valid purposes for which an express trust is created by will in real property cease, or have been accomplished, the estate of the trustee in such property ceases; and every other estate or interest in it vests in the heirs at law of the testator, or in his devisees, who have the benefit and interest therein, as a legal estate. 9th Paiges, R., 110, 523.

In all cases, where from the partial or total failure of an express trust, or from a residuum remaining after its satisfaction, a beneficial interest would accrue to the trustee, not contemplated or intended by the original grantor, the law raises a trust for the benefit of the latter, his heirs or representatives. Thus, where a trust is not co-extensive with the estate conveyed, the use which remains undisposed of, results to the grantor. It is upon this principle, that terms for years are made to attend upon the inheritance, after the special trust for which they were created has been satisfied.

3. What is the construction of law on a conveyance of property, without any consideration express or implied, or any trust declared ?[1]

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[1] An unsealed written acknowledgment or memorandum by the party clothed with the legal title of land, that another is interested in it, a certain number of acres, will not raise a trust to convey the quantity specified, without proof of a consideration paid to the party, making the acknowledgment or memorandum. A trust cannot be implied except upon a consideration proved. Meigs, Rep., 390. In Harrison *vs.* Mc Menomy, et al, 2nd Edw. Chy. R., 251, where a trust was created for the benefit of certain children, merely by a deposit of money in the hands of a third person; and the latter executed his bond and mortgage to the children, it was held, that this money notwithstanding, remained the property of the person depositing it, and subject to her bequest. The Vice Chancellor observed that "parol evidence is admissible to prove a trust in opposition to an absolute deed or written instrument; but it must be evidence of so positive a character as to leave no doubt of the fact, and at the same time so clearly define the trust, that the Court may see what is requisite for its due execution. There can be no doubt that a trust was created for the benefit of the children, on placing the money in the hands of the defendant; for it was not a loan of money to be repaid by him as borrower, but the same was a special deposit for the purposes of investment and accumulation—the fund not being distributable until the youngest child attained the age of 21 years. The number of parts into which the fund was then to be divided, is left uncertain by the parol evidence. The trust restricting the distribution to the survivors is not made out; and the act of the defendant in executing a mortgage payable as mentioned, is evidence to the contrary. In order more clearly to show that the trust was not as asserted by the defendant, the complainants have produced the will of H.; and it has been made one of the points, that even admitting the money to have been

The law presumes an intention on the part of the grantor, that the grantee shall hold the estate for his benefit. The mere want of a valuable consideration will not of itself, and without any auxiliary circumstance raise a resulting trust; for this would destroy the effect of every voluntary conveyance. The absence of a consideration, and of a declaration of the use must both concur.

4. When does the law raise a trust for the benefit of a third person, on a purchase of real estate, and an absolute conveyance executed to the vendee?[1]

It is said to be the clear result of all the cases, that on a purchase of real estate, whether freehold or leasehold; and whether the conveyance is taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; a trust of the legal estate results to the man who advances the purchase money. Where the consideration money is declared in the deed to have been paid by the nominal purchaser, there is some conflict

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confided to the defendant as stated by him, still the subsequent will of the testatrix must alter and control the disposition of it. I think this is correct. The money was still her money; and she might decline the trusts, and fix the distribution as to time, and designate the persons or classes of persons to take. All which she has done by her will." But see 16th Mass. Rep., 221.

[1] 4th Desau., 491; 1 A. K. Marsh, 47; 4 J. J. Marsh., 599; 2nd Black., 198, 440; 1 Dana, 536; 1 Johns. Chy. Cases, 582; 2nd id. 409; 3rd Edw. Chy. Rep., 279; 7 Leigh, 566; 2nd Harr., 225; 4th Black., 540; 1 Freem., 134; 4 Watts & Serg., 149; 4 Harr. & John., 551. A resulting trust must arise, if at all, at the time of the conveyance, and is a pure unmixed trust of the ownership and title to the land itself; 2nd Ashmead R., 470. Payment of the money after a purchase has been completed, is not sufficient to create such a trust. It must be coeval with the deed of conveyance, or it cannot exist; 2nd Johns. Chy. Rep., 409; 3rd Paige's Rep., 390; 6th Dana Rep., 331. It is essential, that the purchase money when paid, should have been the money of him who sets up the trust. If A take a conveyance of land in his own name, from B, and pay the purchase money, and by a subsequent agreement receive the purchase money from C, and agree to hold the land in trust for him, the law will not support the trust, as it does not arise on the conveyance; 5 J. C. R., 1.

among the authorities as to whether parol evidence would be admissible after his death, to prove a resulting trust; but the weight of opinion inclines towards its reception.[1] We have already considered an illustration of the general principle in the case of a purchase of real estate by a partner with partnership funds, and on partnership account. There, it is indifferent in the eye of a Court of Equity, who holds the legal title. The property is a trust for the benefit of all the partners, and their creditors. Courts of Equity do not disturb the rule of law, that where two persons purchase lands and take a conveyance to them and their heirs, advancing equal proportions of the purchase money, the estate is a joint tenancy, and will therefore belong to the survivor. But they will lay hold of very slight circumstance to establish a trust; as for example, the payment of unequal proportions of the purchase money. This doctrine of course applies in all its potency, to the case of an agent or trustee, purchasing an estate with trust funds, and taking the conveyance in his own name.[2]

5. What exceptions are there to the doctrine of a resulting trust in favour of the person who advances the purchase money?

They may be arranged under two classes. First, the law will not imply a trust, where it would be subversive of public policy, as where the purchaser is an alien, prohibited from acquiring or holding real estate. Second, the law will not imply a trust, where it may be presumed to be contrary to the intention of the parties, as where a father or a husband buys an estate,

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[1] It was held admissible by Chan. Kent, in Boyd *vs.* McLean, 1 Johns. Chy. Rep., 582. Where the conveyance states the purchase money to have been paid by the grantee, and there is nothing on the face of the deed that indicates any trust, the evidence to raise a trust must be very clear and satisfactory; 1 J. Chy. R., 59; 8 N. H. R., 187.

[2] 2 Wash. C. C. Rep., 445; 3rd How. S. C. R., 333; 3rd Watts & Serg., 280; 2nd McLean, 269. Lands purchased by a husband in his own name, with monies arising out of the separate property of his wife, secured to her by settlement, are deemed to be held in trust for her; 1 J. Chy. Rep., 457. So, land purchased by executors, with money belonging to the estate, was held to be a trust for the family; 2 Serg. & Rawle, 521.

and takes the title in the name of the child, or the wife.[1] In these cases, it may fairly be inferred that motives of affection dictated to the parent, an advancement of the child, or to the husband a provision for the wife, and such, in the absence of all controlling circumstances, is the light in which the law regards the transaction.

6. When do Courts of Equity consider the executor as a trustee for the next of kin, of the undisposed of personalty of his testator?

At common law, the residuum of the personal estate after payment of debts and charges went to the executor. Courts of Equity, however, interfered wherever the presumption of a gift to the executor could be repelled even by a strained construction of the will, and converted him into a trustee for the next of kin. The curious and nice distinctions which have been established in England on this subject, possess no practical value in our own country, where the residue is by law universally distributable among the next of kin, in the absence of all expressions of a contrary intention by the testator.[2]

7. What is meant by the equitable conversion of property?

Courts of Equity, as we have previously stated, frequently

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[1] 6th Black., 193; 2nd Johns. Chy. Rep., 540; 4 Serg. & Rawle, 333. "The reason why the law will not imply a trust as between parent and child, from the simple fact that the consideration was paid by the parent, and the title was conveyed to the child, is, because the consideration of blood is sufficient to raise a use, and the conveyance will be deemed an advancement. But when the presumption of an advancement can be repelled or destroyed, a trust will result by implication, as between strangers. So, if it appear that land bought by the father with his own funds, has been conveyed to the child, not for the purpose of advancing him, in good faith, but for the unlawful and sinister purpose of defrauding the precedent creditors of the father, then as the presumption of an advancement will be repelled, a trust will result to the father, for the use of his creditors, and so far as those creditors may be concerned, Equity will treat him as the true owner." Ch. Just. Robertson, in the case of Doyle and others, *vs.* Sleeper & Alsop; 1 Dana, Rep., 537. See also, 1 John. Chy. R., 261; 2 J. C. R., 540.

[2] 3rd Binn., 557; 9 Serg. & Raw., 424, 186; 6 Mass., 153; 2nd Hay, 298; 1 Penn., 44; 4 Leigh, 163.

consider that as done, which has been agreed to be done. Thus, land contracted to be sold, is treated as the personal estate of a vendor who has not parted with the legal title, and money devised to be laid out in land as the real estate of the devisee. Where, however, the contest is between the real and personal representatives of the testator or intestate, Courts of Equity will not interfere to change the quality of the property, unless an unequivocal intention has been manifested to give it a new character.

8. What are liens, and how regarded in Courts of Equity?

By the common law, liens exist only in cases, where the party entitled thereto, has either actual or constructive possession of the goods; but in the maritime law, and in equity, they exist independently of possession. The lien is a qualified right which necessarily supposes the property to be in some other person; and which only constitutes a charge upon the thing. Courts of Equity will recognise and enforce liens at law, and sometimes to a greater extent and in a more beneficial manner.[1] Thus, they not only acknowledge and protect the lien which a judgment creditor acquires on the land of his debtor, by virtue of the right to issue a writ of *elegit*, but where the annual rents and profits will not be sufficient to discharge the debt within a reasonable time, they will decree a sale.[2] So, where land has

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[1] Where a lien or equitable claim, constituting a charge *in rem*, is a matter of agreement, it will be enforced in Equity, not only upon the real estate, but also upon personal estate, or money in the hands of a third person; and against the party himself, his personal representatives, or persons claiming under him. 2nd Story's, C. C. R., 555. But in the absence of such an agreement, the vendor of personal property has no lien for the purchase money, though the property is still in the vendee's hands; 8th Leigh, 510; 2 A. K. Marsh., 533; 5th Ohio, 35.

Where the interest in real estate is reversionary in its character, the Court will more readily direct a sale. For, in regard to property in present actual possession, the *elegit* although tardy in its operations is somewhat effective, inasmuch as it will give the creditor the means of receiving something annually towards his debt; yet in the case of a dry reversion, if the outstanding life estate should continue during half a century, the creditor might look in hopeless despondency, without the

descended to the heir, bound for the specialty debts of the ancestor, Courts of Equity, on the application of the creditor, will compel him to render an account of the rents and profits received since descent cast.[1]

9. What liens are raised by Courts of Equity on the sale of real estate?

When the vendor of an estate makes a conveyance of the title, before payment of the purchase money, Courts of Equity consider the vendee as holding the land in trust, to satisfy the claims of the vendor or his personal representatives.[2] On the

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possibility of receiving a cent from that source, except through the interposition of a Court of Equity in decreeing a sale. 13th Peters, Rep., 465, where this subject is elaborately examined by Justice Barbour, in delivering the opinion of the Court.

[1] In 2nd Leigh., 268, it was held, that the judgment creditor had a lien in Equity upon the equitable estate of the debtor, in like manner as he had a lien in law upon his legal estate.

[2] This lien has not been fully recognised in Pennsylvania, 7th Serg. & Rawle, 64; nor in Massachusetts, 1 Mason's Rep., 191; and only *sub modo* in Connecticut; 6 Conn., 464. In North Carolina its existence is yet unsettled; 1 Iredell's E. R., 349. The American Cases are cited at large in the note of Mr. Sumner to 6th Ves. Rep., 752, and the notes of Mr. Perkins, 1 Brown C. R., 303, 358. If the vendor can recover his money at law, Equity will not interfere to enforce the lien on the land; 6 Gill & Johns., 495; contra, 10 Yer., 186. But where the vendor merely gives a bond to make a title on payment of the purchase money, and the vendee makes default, the former may go into a Court of Equity, without any allegation of the vendee's insolvency, to enforce a specific performance of the contract, and have the land sold for the satisfaction of his debt; 1 Bland., 491; 2nd Smeade & Marsh., 561; Meigs R., 52.

The lien of the vendor cannot be asserted against creditors holding under a bona fide conveyance from the vendee. The lien of the vendor is a secret invisible trust, and although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or an equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity, connected with such advantage; 7th Wheat., 46; S. P. 3 Gill & J., 425; 5 Yerg., 205; 2nd ed., 511. The same principle was carried out in 3rd Leigh, 597. It was there held, that where H sold land to M, and took no security for the purchase money, and M then sold the same land to F, took his

other hand, it seems established, notwithstanding some intimations of a contrary opinion, that a similar lien on the land arises in favor of a vendee who has paid the purchase money, before

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bonds for the purchase money, and assigned those bonds for valuable consideration, the assignee having no notice of H's claim to a lien on the land, for the purchase money due him by M, though H might have been entitled to payment of the purchase money, due from M, out of the bonds of F, if the same had remained in M's hands, yet H cannot assert any such Equity against the bona fide assignee of the bonds. Judge Cabell very clearly expresses the principles of law, applicable to the case: "If the vendor convey land to the vendee, in such a manner as to make him appear to be the complete owner, with full power to sell or charge it, justice forbids that he should use this secret lien to the injury of those, who in ignorance of it, have acquired for a valuable consideration, either the legal title or an equitable encumbrance. That this is so as to a purchaser of the legal title, or a mortgagee, or an equitable incumbrancer, who has the preferable right to call for the legal title, is not denied. I think the principles of Equity require us to go one step further, and to protect from this secret lien, of the vendor, all subsequent equitable incumbrances, however acquired, provided they be acquired for a valuable consideration and without notice. I do not think it necessary to fortify the Equity of a mere incumbrancer, by shewing that he has a legal advantage, or a preferable right to call for the legal title. It is sufficient that he has an Equitable lien on the land."

The authorities are divided on the point, as to whether the lien of the vendor passes to his assignee, on a transfer of the bond for the purchase money. In Kentucky, a series of decisions have extended this lien to the assignee; 4 Litt., 289; 5 Monr., 287; 2nd Dana, 99. The same rule is said to prevail in Virginia; 1 Tucker's Com., 337, old ed. And it has been recently recognised in England; 3d Mylne & Craig, 670. But the Courts in New York, Maryland, Mississippi, Ohio, and Tennessee, have manifested a disinclination to enlarge the operation of this equitable principle, by extending its protection to an assignee of the note for the purchase money; vide 1 Paige's Rep., 506; Bland's Chy. Rep., 524; 6th How. Miss. Rep., 370; 1 Ohio, 318; 3rd Yerg., 27. In 1 and 2 Ham., 147, it is said that the vendor's lien is in the nature of an implied trust, attaching to the land, and following it into the hands of a subsequent purchaser with notice, upon the universally received doctrine that he who purchases a trust property with notice of the trust, is bound by it. But this trust does not, and cannot attach to the notes given for the purchase money; it is a substantive right, distinct and seperate from the notes. The vendor may unite them, by keeping the notes in his own hands, but he cannot transfer both to the assignee of the notes,

receiving the title. The lien of the vendor may be enforced for the benefit of third persons, as for example, by marshalling the

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either at law or in Equity. A distinction has been taken, the propriety of which is obvious, between the cases; where the vendor has parted with the legal title, and where he retains it. In the latter he is regarded as a trustee for the assignee, who, on bringing all parties before a Court of Equity, may have the land sold to satisfy his debt. But if the note expressly states that the land is also bound for its payment, the lien thereby created passes in Equity to the assignee of the note; 1 Freem. Rep., 574. In 2nd Ohio, 383, it was held, that the lien of the vendor who has not parted with the legal title, passes to his devisee. Judge Burnet, in delivering the opinion of the Court, used the following language: "The death of a vendor cannot impair his rights. They must pass to his representatives, in the condition in which they were at his death. If the debt in the life time of the vendor was an Equitable lien on the land, it must continue so in the hands of the heir or devisee, for at his death, all his legal and equitable rights, pass by operation of law, in the same state in which he held them. No good reason can be assigned, why any of them should be forfeited by an act of Providence not under his control. The duration of an estate may be limited by the terms of the grant, to the life of the grantee. But such a limitation was not contemplated by the parties in this case. The rights mutually acquired were intended to survive. I do not see by what rules of construction, a limitation can be applied to the equitable, that does not equally affect the legal right. The security for the debt should be as permanent as the debt itself. They ought to exist and expire together. The object of the one was to ensure the enjoyment of the other. The lien of a vendor is not founded on arbitrary principles that require a rigid construction. It is not of such a nature as should induce a Court to lay violent hands on it, whenever a plausible pretext can be found for doing so. It is founded on principles of justice, and ought therefore to be protected. It originated in the care which the law feels for the preservation of equitable rights. It was intended to prevent one man from enjoying the property of another without consideration, and it therefore applies as well to the representatives of a deceased vendor, as to the vendor himself. It is in the nature of a mortgage, provided by the benignity of the law for those who may have been too confiding; and in my estimation our legal system would be imperfect without it. The great object of every code of laws is to prevent injustice, and the more effectually that end is accomplished, the nearer does it approach perfection. Justice certainly requires that real property, sold on contract, should be answerable for its price, as far as is consistent with the safety of third persons."

assets on the application of a legatee or creditor, where the vendor has been paid out of the personal assets of a deceased vendee. The lien exists not only against the vendee himself, but his heirs and privies in estate, and all subsequent purchasers with notice. It will also prevail against assignees, who claim under a general assignment by a bankrupt or insolvent debtor; as they take only such rights as the bankrupt himself could assert at the time of his bankruptcy; but not against an assignment for the satisfaction of certain enumerated debts. The creditors in this case, are regarded as standing in the position of *bona fide* purchasers for a valuable consideration without notice. And even where the estate has passed into the hands of a bona fide purchase without notice, he takes it *cum onere*, to the extent of the consideration money remaining unpaid. *Prima facie* the lien exists without any special agreement to that purpose, and it remains for the purchaser to show that from the circumstances of the case, no lien was intended to be reserved. The authorities are very conflicting as to the circumstances which will establish that fact. It seems to be the better opinion that taking a bond, note, or covenant from the vendee will not, of itself, amount to an extinguishment of the lien. But taking a personal collateral security, or taking a collateral security in the nature of a pledge or mortgage, is evidence that the seller did not repose upon the lien, but upon independent security, and it discharges the lien.[1] But merely endorsing a receipt for the payment of the purchase money on the back of the deed, or postponing its payment to a future period, does not amount to a waiver of the lien.

10. When will Courts of Equity raise a lien for the benefit of a person who has expended money or labor upon the property of another?

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[1] Kent's Com., Vol. 4, page 153; 1 Paige's Rep., 20; 4th Wheat., 255; 1 Mason, 191; 5th Ohio, 35; 3rd Alabama, 302; 2nd Desau., 509; 1 Black., 416; 6th Black., 272. But where the title remains in the vendor, the circumstance of taking collateral security will not affect his lien. Where the vendor by the terms of his contract, is to retain the title, until payment of the purchase money, it would be manifestly unjust, to compel him to part with it any sooner, because he has taken independent collateral security. This would be to make a contract, not enforce it; 5th Ohio, 35.

Courts of Equity, as we have already seen under the title of Contribution, will sometimes compel one joint owner of property to make compensation to another, who has expended money on the estate for their common benefit, in proportion to the amount of his interest. This right of contribution, although sometimes acknowledged by Courts of Law, is more extensively and beneficially applied in Equity, and money laid out in improving an estate, is sometimes regarded not only as a personal charge, but as constituting a lien on the property itself. This doctrine is not confined to joint purchasers. Wherever the owner of property has received substantial benefit from improvement made upon it by a bona fide possessor, Courts of Equity will not grant assistance to such person, except on the terms of his making compensation, and where his fraudulent conduct has induced the expenditure, it will create a lien on the estate. Courts of Equity will also support and enforce the liens, given by the common and maritime law to artificers and other persons who have laid out money or labor upon personal property.[1]

11. When do Courts of Equity raise a lien from the possession of trust property?

It is a settled doctrine, that where property is bound by a charge or trust, Courts of Equity will preserve and enforce such trust, by following it into the hands of all persons, who are not innocent purchasers, or clothed with some superior Equity. Thus, a man coming into the possession of property charged by a last will and testament with the payment of debts or lega-

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The question of waiver of lien by the vendor, by taking other security, is a question of intention, to be established or explained by proof. If so, there can be no stronger evidence of an intention not to waive the lien, than the retention of the title, especially with a covenant to convey only when the last instalment is paid. 4 B. Monroe, 131.

[1] A Court of Equity has jurisdiction to enforce liens and pledges of personal property generally, and may order a sale of the property to pay charges; but Chancery has no jurisdiction of such a demand independent of the lien. And as the proceeding is *in rem*, quere whether there could be a decree in *personam*, for the balance, in case the property should not sell for enough to pay charges? 5 Dana's Rep., 311.

cies, will be liable in Equity directly to the creditors or legatees. So, where an executor has paid over to the legatees or distributees, the funds of an estate, under a honest but mistaken belief, that all the debts had been satisfied, that portion of the assets will be regarded in Equity, as a trust fund, for the benefit of creditors. On a similar principle, each partner upon the dissolution of a partnership, has a lien upon the partnership effects, as well for his indemnity, as his proportion of the surplus—which a Court of Equity will enforce by means of a sale. Through the medium of this Equity, joint creditors may obtain a preference over the separate creditors. They have no lien, but something approaching to a lien, which will be regarded and protected in all cases, where no superior rights intervene. Very analogous is the case of a private corporation, whose stock or other property is deemed a trust fund, which may be followed by the creditors of the corporation, even after its dissolution into the hands of all persons, save a bona fide purchaser, without notice. Thus, a stockholder of an incorporated bank, who has received any dividend or share of the capital stock, will be held liable in Equity, to a *pro rata* contribution towards, the discharge of any debts remaining unpaid, out of the funds in his hands.[1]

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[1] The grounds of this doctrine are thus clearly stated by Judge Story, in Wood et al, *vs.* Dummer et al, 3rd Mason's Rep., 311. "It appears to me very clear upon general principles as well as legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of its debts. The public as well as the legislature have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacties. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public, as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment

12. When do Courts of Equity force a trust, upon the conscience of a party, *in invitum*?

Where there is any fraud touching property, Courts of Equity administer a wholesome and sometimes a stern justice, in favor of innocent persons, who without any fault of their own, have suffered from it. To this end they will convert the guilty party into a trustee, and fasten upon the property an equitable lien

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by, the stockholders so diligently required? To me, this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt, that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it; and the stockholders have no rights until all tho other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and cannot take any portion of the fund, until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid." These principles have been recognised in Massachusetts, 15 Mass., 505; 16 Mass., 9; and in Ohio, 5th Ohio R., 162; in Kentucky, B. Monroe's Rep., 197; and New York, 8th Cow., 387; 7th Paige's Rep., 198; and by the Supreme Court of the United States, 8th Peters, 281.

In South Carolina, the principle has been extended farther. In the case of Hume *vs.* Winyaw and Wando Canal Company, decided by Chancellor De Saussure, and affirmed by the Court of Appeals, it was held, that a bill may be sustained against individual corporators, on a contract with the company, for a discovery of funds to satisfy the contract; and if it appears that the funds were to be raised by future instalments, to be called for as the demands against the company required them, Equity will regard the capital as consisting of the individual credit of the corporators, and subject them to contribute to the satisfaction of demands arising on contracts, made while they were members. When the funds of a corporation are not visible and tangible, but consist in the liability of the members to be assessed, or rated, the Court will lend its aid in favor of the creditor of a company to assist him in enforcing the payment of instalments required of the members, and will apply the fund so raised to discharge the debt. It is a *quasi* subrogation of the complainant to the rights of the company. The Chancellor and the Court of Appeals rely upon the case of Dr. Salmon *vs.* the Hamburg Company, 1 Chy. Cas., 206, as an authority. The same case is quoted with approbation by Judge Spencer, in 8th Cowen, 387. In the American Law Magazine, Vol. 4, page 363, these cases are elaborately examined and condemned.

for the indemnity of the person who is entitled to the beneficial interest. Many illustrations of these principles, have been already given, under the title of Fraud. A familiar case of their application, occurs on the wrongful sale of trust property, where Courts of Equity hold both the trustee and a purchaser from him with notice, responsible for the misapplication, and to make this liability the more effectual, the rights of the original owner or *cestui qui trust*, follow and and attach to the property, whatever form it may have assumed, provided its identity can be established, and it has not passed into the hands of a bona fide purchaser for a valuable consideration without notice.[1]

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[1] The case of Oliver et al vs. Piatt, 3rd Howard's S. C. Reports, 333, involved various interesting questions connected with the law of Trusts. The following extract is from the opinion of Mr. Justice Story, one of the last which he delivered. "It is a clearly established principle in Equity Jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property by sale, or otherwise, to any third person, the *cestui qui trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds in any other property into which it can be distinctly traced, the cestui qui trust has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the cestui que trust is one which positively and exclusively belongs to him, and it is not in the power of the trustees to deprive him of it by any subsequent re-purchase of the trust property, although in the latter case the cestui que trust may, if he pleases, avail himself of his own right, and take back and hold the trust property upon the original trust; but he is not compelled so to do. The reason is, that this would enable the trustee to avail himself of his own wrong; and if he had made a profitable investment of the trust fund, to appropriate the gain to his own use, and by a re-purchase of the trust fund, to charge the loss or deterioration in value, if any such there had been in the mean time, to the account of the *cestui que trust*, whereas the rule in Equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust*, and all the losses shall be borne by the trustee himself. The option, therefore, to take the new or the original fund, is given to the *cestui que trust* for the wisest purposes, and upon the soundest public policy."

13. What are the duties and responsibilities of a trustee in Equity?

A trustee, as a general rule, is not allowed any remuneration for his care and trouble, his office being esteemed entirely honorary. This rule is so unreasonable, especially when considered in connection with the responsibilities of trustees, that it has become a common practice, sanctioned by Courts of Equity, for them to stipulate beforehand for a fixed compensation.[1] It

[1] The English rule that a trustee is not to be remunerated for his time and trouble, has been either repealed by statute, or repudiated by the Courts, in most of the American States. It was recognised in New York by Chancellor Kent in the case of Manning *vs.* Manning, 1 Johns. Chy. Rep., 534, and its policy defended. It was held doubtful whether even an agreement with the cestui que trust for an allowance made after the creation of the trust was binding, although valid, if made at the time of its execution; 1 Johns. Chy. R., 527, 620; 2 Johns. Chy., 316. This decision induced the Legislature of New York, to pass an act authorising the Court of Chancery to make a suitable allowance to executors, administrators, and guardians, for their services. It has been decided in Pennsylvania, that trustees may be entitled to compensation, without any express direction or contract; 3rd Binn., 427. In Massachusetts, executors are allowed a reasonable compensation, and the Court has said, that there is no reason why the rule should not be extended to trustees. Five per cent. has been allowed as a commission on all the property that has come to their hands; 16 Mass., 221; 11 Pick., 123. In Maryland, trustees have been allowed all proper and necessary expenses incurred by them; thus for a fee paid to a solicitor for advice, in relation to the trust; 2nd Bland., 167; 1 Gill & Johns., 273; 6 Gill & J., 35. A commission is allowed them in Virginia; 4 Hen. & Munf., 415; 6 Mun., 92. In Delaware, it has been held that a voluntary trustee without contract for compensation, is not entitled to any in Equity, though he is entitled to have his expenses paid and to be saved from loss; 3 Harr., 110. In South Carolina, the trustee may be remunerated for the actual amount of money, or labor bestowed on such improvements as are necessary to preserve the property, or to render it permanently more beneficial; 2nd McChord's Chy., 82. In Kentucky, it has been held, that trustees may be reasonably compensated for attention to trust duties, without any express contract therefor; 1 B. Monroe, 349. The remarks of Chief Justice Robertson in this case are worthy of quotation: "This arbitrary rule of the English Courts, was as early as the time of Lord Keeper North, considered "a great hardship." Chancellor Kent, whose judicial motto was *via antique via est tuta*, virtually conceded in Manning *vs.* Manning, that this British rule

would seem just, that a trustee, like a bailee without reward, should only be liable for gross negligence, and that he should not be responsible for any loss of the trust fund, where he has acted in good faith, and in the exercise of a fair discretion, and in the same manner, as he has been accustomed to do, in regard to his own property. But certain artificial rules of a more stringent character, have been laid down by Courts of Equity, which Lord Kenyon has observed, should be rung in the ears of every person who assumes this office. A trustee is bound to perform all such acts, as may be necessary and proper for the due execution of the trust, which he has undertaken. If a suit is brought against the property, he must defend the title; he must protect it from waste or injury; must keep regular accounts in relation to its management; and in all respects where the interests of the cestui que trust are involved, conduct himself fairly and discreetly. If there are any special directions in the instrument creating the trust, they must be observed. If he neglects to do this, he will be guilty of a breach of trust, and answerable in Equity for the consequences. It has been said that a trustee may do any act voluntarily, which he could be compelled to perform by suit. But great caution is requisite in the application of this rule, as the trustee must take upon himself to decide, what would be the decree of the Court. It is the duty of a trustee to preserve the trust property, with the same

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was unreasonable, though he conformed to it; and it has been evaded even in England, by liberal constructions of trust documents, for the purpose of deducing from them, a presumed intention to allow compensation, and also by making ample allowances for *expenses*. We have never been able to perceive either the consistency of the rule, or the force of the reasons assigned for it. It should be no less true in the *municipal*, than in the *divine* code, that "the laborer is worthy of his hire," and there can be no doubt that heavy and responsible trusts are rarely, if ever undertaken as merely honorary, without expectation of indemnity at least. Moreover, there might be danger, not only of non-acceptance, but of injurious infidelity, if strangers, nominated for their skill, should know, that for all their devotion, time, and responsibility, they can be entitled to no compensation, unless they make a contract, which in many cases cannot be made, for want of opportunity, or competent parties."

care that a prudent man would exercise over his own; and he will therefore not be responsible for any loss arising from robbery or inevitable accident, and he may establish the amount of such loss by his own oath.[1] He should not allow trust money to remain standing on merely personal security; much less should he invest the trust fund in that manner, for however unexceptionable the securities at the time, the trustee will be responsible in the event of their future insolvency. The only stock in which he can safely make an investment, is that in which a Court of Equity itself is in the habit of laying out its funds. In all other cases he will be required to take security on real estate, or some other thing of permanent value.[2] In regard to interest upon trust funds, the general rule is followed, that all gain acquired by means of a trust, shall enure to the benefit of the cestui que trust; and Courts of Equity will even direct annual rents to be made, so as to charge the trustee with compound interest, where the cestui que trust has been deprived of it by his faithless or fraudulent conduct.[3]

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[1] The personal representative of a trustee may avail himself of this defence after the death of the latter, although it is not corroborated by oath; 1 Caine's Cas., 96.

[2] Trustees acting with good faith, are treated by the Court with liberality and indulgence. And where there is no wilful misconduct or fraud on the part of the trustee or executor, he will not be held responsible for a loss, especially where he acts with the advice of counsel; 4 J. C. R., 619; 3 Gill and Johns., 311. Although as a general rule, it is the duty of trustees, and executors to call in money immediately, which they find placed out on good security, yet they are not absolutely precluded from the exercise of all discretion; 7th Vesey, 150; vide also, 11th Wend., 361; 3rd Desau., 245. A trustee in the possession of land is required to account to the *cestui que trust*, not only for the rents and profits actually received, but also for the rents and profits which might have been received; 1 Paige's Rep., 188.

[3] The general rule is, that if a trustee has made no interest, and there has been no laches or neglect on his part, nor any use of the funds, he will not be charged with interest; 5 Mason, 332; 5 Johns. Chy. R., 448; but is otherwise, if he ought to have made an investment yielding interest. It has been held in Kentucky, that a trustee using a trust fund, should pay 6 per cent. interest annually, and if not annually

The question has been much discussed, how far one guardian, executor, or trustee is responsible for the acts of another. A distinction has been sometimes taken between the case of executors and trustees, favorable to the latter. If one trustee joins his co-trustee in a receipt for money, this will not make him liable for more than he has actually received; but a different rule has prevailed in reference to executors. The ground of the distinction seems to be, that as trustees have no power to act separately, they are as it were, compelled, the one to join in the receipts or conveyances of the other. But as the separate act of an executor is valid, a joint receipt must be construed into a

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paid, the interest to be annually made principal; 2 B. Monroe, 262. For a trustee to allow money to remain idle, is such a neglect of duty, as will make him chargeable with interest; 5th Dana, 132. But trustees who hold funds during a contest between mortgagees, without using them, and who are not required to pay them into Court, should not be held accountable for interest; 2nd B. Monroe, 406. Where trustees refuse to account, the Court will adopt the most rigid rule for calculating interest; 2nd McChord's Ch., 266. See farther, 2nd Wend., 77; 3rd Mason's R., 284; 1 Johns. Chy., 508, 527, 620; 4 Johns. Chy., 305; 5th Johns. Chy., 497; 1 Hopk., 424. The rule is laid down in 4th Henn. & Munf., 416, that a trustee must pay interest for trust moneys in his hands, unless he can show that it was necessarily kept for the purposes of the trust, and this he may do upon oath, subject to be controlled by other testimony and the circumstances of the case. Otherwise, he must pay the interest, or as was said in Granberry's case, apply to the Court for directions how to dispose of the money, for his own safety, or bring it into Court and apply it as he may be directed. The cases in which compound interest has been given against a trustee, are reviewed by Chancellor Kent, in a note to his Commentaries, vol. 2, page 231, and the propriety of allowing it under proper limitations maintained. "The total abandonment of the rule would operate in many cases, most unjustly as respects the rights of the cestui que trust, and would introduce a lax discipline that would be dangerous to the vigilant and faithful administration of trust estates. It would be tempting trustees to keep on hand, for their own speculation and profit, the interest moneys of others, without interest, contrary to their duty. If a trustee might go and trade with trust moneys, and make no account of the profits, and without any other penalty than the payment of simple interest, without annual rents on the capital so corruptly perverted, the temptation to abuse would be irresistible. Such men ought to be dealt with by the plain but wholesome rules of Lord Eldon."

willingness to bear a joint responsibility. The principle laid down by Chancellor Kent, seems most conformable with justice. It is, that if two executors, guardians, or trustees join in a receipt for trust money, it is *prima facie*, though not absolutely conclusive evidence that the money came to the hands of both. But either of them may show by satisfactory proof, that his joining in the receipt was necessary or merely formal, and that all the money was in fact received by his companion. And without such satisfactory proof, he ought to be held jointly liable to account to the *cestui que trust* for the money, upon the fair implication resulting from his acts, that he did not intend to exclude a joint responsibility. So, one trustee will be held responsible for the wrongful acts of another, where he has positively acquiesced in them, or induced their commission by supine indifference towards his own obligations. In all other cases, it seems unjust that one trustee should be condemned for the neglect or misconduct of another.[1]

14. Will Courts of Equity enforce trusts, which attach to property situate in a foreign country, or which can only be properly executed abroad?

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[1] Each executor is liable for his own acts only; unless he hands over the moneys received by him to his co-executor, or joins in the misapplication of it, or by negligence suffers his co-executors to receive and waste it. 8th Paige, 153; 7 John., Chy., 22; 2 Penn., 419; 1 Dessau., 520; 4 ibid., 92, 65; 1 Iredell's Equity Cas., 93; Dev. Equ., 516; 9th Ver., 41; Litt. Sel. Cas., 235; 2 Hills, Ch., 293. The Supreme Court of the United States, in Peter *vs.* Beverly, 10th Peters, 532, say, that one executor is not responsible for the devastavit of his co-executor, any farther than he is shown to have been knowing and assenting at the time to such devastavit; and merely permitting his co-executor to possess the assets, without concurring in their misapplication, does not render him answerable for the receipts of his co-executor. S. P. 5 Pick., 96; 14 Peters, 166.

They may become jointly liable under an administration-bond, as sureties for each other, 8th Leigh., 54; 6 J. J. Marsh, 571; 2 Brock., 403. Executors will be liable for each other in any transaction which they have commenced together. Thus, where two executors sold out stock, and the produce was received by one, it was held that the other was responsible for its misapplication, but was entitled to an enquiry,

Several illustrations have already occurred under the head of Specific Performance, Charities, &c., of the power of a Court of Equity to exercise its remedial functions in a foreign jurisdiction, by means of its capacity to act *in personam*. The same

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whether any part had been applied in discharge of claims against the testator. 2nd Beavan., 472. So, where money stood in a banking house to the joint account of two administrators, and was drawn out by one of them, who afterwards applies it to his own use, the other would be liable. 3rd Mylne & Craig., 490; 8th Simons, 594. One executor is not liable for assets that come into the hands of his co-executor only, whether they plead several pleas of *plene* administravit, or a joint plea. 3rd Bibb., 97. The joining in a receipt, though not absolutely necessary, is not *conclusive* against an executor. The true enquiry is, whether the money received was under the control of both executors. The joining in the receipt is evidence of that control, though it is not conclusive. 1 Dev. & Batt., 336.

The relaxation of the old rule in England was frequently and energetically deplored by Lord Eldon, who said that the rule—by which joining was considered as acting, was a plain and simple one; but that in the distinctions and exceptions since established, scarcely two judges agree. It has been stated as a general rule, that where by any act or agreement of a trustee, money gets into the hand of his companion, whether a co-trustee or executor, they shall both be answerable. 4th Dessaus., Chy. Rep., 65; 4 John's Rep., 26. This general language, as we have already seen, must be taken with many qualifications.

This subject was examined with great learning and ability by Ch. J. Gibson, of the Supreme Court of Pennsylvania, in the case of Jones *vs.* Levering, reported in the 8th Vol. of the Law Reporter, page 109. There, it was held to be neither universally, nor generally true, that money which has come to the hands of a trustee by the act or consent of his colleague, without positive negligence on the part of the latter, is chargeable, indifferently, to either. The diligence required of a trustee, in taking charge of the trust estate, is precisely the diligence which a man of ordinary prudence would practice in taking care of his own. Therefore, where two guardians in affluent circumstances, and good repute, apportion the custody and management of the property, to suit the peculiar capacity and qualifications of each, but without surrendering the right of either to meddle with the whole, each is chargeable with no more than he received, unless he stood supinely by, while his colleague was manifestly impairing the estate. In that case, one of two guardians appointed by last will, consented to accept the office, only on an explicit understanding, that he was to manage the real estate for which his

principles are applicable to trusts, attached to lands situate in a foreign country. The Supreme Court of the United States, in the case of Massie *vs.* Watts, 6th Cranch's Rep., 160, lay down the broad doctrine, that in cases of fraud, of trust, or of contract,

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pursuits fitted him, and have nothing to do with the custody and investment of moneys for which his colleague was eminently qualified, by experience and education. The latter became subsequently involved, and finally failed, and an effort was made to charge the former for the amount of the loss, on the ground of the original agreement.

The law is yet so unsettled, and the remarks of Ch. J. Gibson, so distinguished for good sense, that we spread a portion of his opinion before the student He says, "In Attorney General *vs.* Randall, (21 Vin. Trust.) one of three trustees to build an alms house, called on the executors for the money, and was refused payment except on the joint receipt of all; whereupon he procured the signatures of the others, received the money, and failed at the end of five years. The Lord Chancellor said, it would not be expected that all should meet together to receive; but if they had, either one must have had the custody of the whole, or it must have been divided into shares. And, if they trust one of themselves for convenience or necessity, when all are solvent, which is no more than making him their banker, shall Equity punish where there is no default. To charge trustees in such a case, would make a duty very perilous, which is most necessary for the common good, and the convenience of families. And he said that he saw no reason why trustees may not make one of themselves their cashier, where there is no fraud; that this was a reasonable thing at the time, as R., (the receiver,) was the only trustee, who lived in London, where the money was paid. And as to an objection made to letting the money lie so long in R's. hands, he said, the case of R., differs from the case of a common banker, where the money may be drawn out at pleasure; but here R., had as good a right to the keeping of it as the others, and all paid out till about one-third; and he was entrusted by the testator, as well as the others. Now the joint receipt was signed in that case, for the very purpose of enabling R., to receive the money, which got into his hands, by the act and agreement of his colleagues, of a nature affirmative as a positive order would have been. Indeed every joint receipt is such, and less negative in its character than a mere refusal to receive. The appellant in this case, in declining to receive the moneys, did no more than every trustee does, who signs a joint receipt for the purpose of putting the money into the hands of his colleague; and in limiting his active agency to that part of the business alone, for which he was qualified, he acted on the same principle. Who will venture to say, that the ar-

the jurisdiction of a Court of Equity is sustainable, wherever the person may be found, although lands not situate within the urisdiction of the Court may be affected by the decree. The jurisdiction is, of course, limited by the ability of the Court to

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rangement did not promise fairer to be beneficial to the wards, than any other that could have been made; and if it was executed in good faith; why should it be made a ground of charge? Guardians are sometimes chosen for the very reason that their qualifications are diverse, so that each may take charge of those parts of the trust for which his education has fitted him. Thus a lawyer might beneficially leave the management of his ward's furnace or forge, to a colleague, who had been bred an iron master, while he himself attended to the collection of the debts, the settling of the estate, and the preservation of the title papers. Still, it must be admitted, that a guardian commits a breach of trust when he parts, even for a time, with his right of joint control, so as to preclude him from exercising it, when necessity calls for it.

Negligence is imputed to the appellant, in omitting to call his colleague to account, when fears of his solvency were actually excited in him. But the ground of these fears was very slight; and therefore, less might justify him in dismissing them. Both then, and afterwards, no one stood higher in public opinion than his colleague as a man of integrity, business, and wealth; and that the appellant had no stronger reasons for suspicion, than that he had sometimes seen him called aside on private affairs, by those who might be duns, evinces a very great degree of vigilant observation. But by these trifles, light as air, his suspicions were actually excited; and they impelled him to do, what a cautious man might be expected to do. He enquired into the disposition made of the moneys, and was told by his colleague, whose truth had never been questioned, that the whole was invested in bonds, and a mortgage on a landed estate, which was pointed out. To require him to have dealt with his colleague as a rogue, by demanding a sight of the securities, would require of him the highest and most exact diligence; a degree of it that would ruin every guardian in the State. No rate of commission would compensate the risk incurred from such a trust; and no man of prudence in his own affairs would accept it.

Again, it is insisted on the authority of Bruce *vs.* Stokes, 11th Ves., 319, and Walker *vs.* Symonds, 1 Swan's, 42, that the appellant was guilty of laches in suffering the money to remain in his colleague's hands fourteen years, especially as the statute had made it the duty of guardians to render triennial accounts, without being cited. These two cases would go far to sustain the charge; but there has at all times been more inconsistency of opinion on this subject in the English Courts, than

grant the relief sought. Thus, a bill would not be entertained for the partition of lands in a foreign country, because the Court could not issue a commission.

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on any other, and more than is to be found in our own books on all subjects together. Perfect consistency is unattainable by any Court, and perhaps our own decisions are not free from discrepancies, in regard to principles which are not rules of property; but nothing done by any American Court will bear comparison with the sweeping alterations made by the English judges, on the common law. On the subject before us their decisions have been always loose, and we feel ourselves so far unfettered by foreign precedents, as to be at liberty to adapt the rule of a guardian's vigilance to the business habits and transactions of our own people. If he were held liable for the omission of any imaginary measure of precaution, which human sagacity might foresee, the principle of accountability, would be impracticable, in a country where counsel cannot be consulted at every step, without incurring an expense which would often swallow up the estate. Where the property is small, plain country farmers, unversed in the intricacy of the law, are generally prevailed on by the friends of the infant to take charge of it; and from them justice requires no more than good faith, and vigilance adequate, under the circumstances, to reasonable performance. It certainly does not require that the office of a guardian, should be a trap for the unwary."

Similar principles have been affirmed in Alabama. In 3rd Alabama, R., N. S., 83, it was held, that trustees are responsible for their own acts, and not for the acts of each other, unless they have made some agreement, by which they are bound for each other, or have by their own voluntary co-operation or connivance, enabled a co-trustee to accomplish some known object in violation of the trust.

CHAPTER XXXIV.

PENALTIES AND FORFEITURES.

1. JURISDICTION OF EQUITY IN CASES OF PENALTIES.
2. JURISDICTION OF EQUITY IN CASES OF FORFEITURES.

1. When do Courts of Equity grant relief against penalties ?[1]

Wherever the parties to an agreement have fixed upon a certain sum, as the real amount of damages, which one of them will sustain from an act or omission of the other, this amount is not regarded by Courts of Equity as a penalty, but as liquidated damages, which if not unreasonable or extravagant should be borne by the wrong-doer.[2] But wherever a penalty is inser-

[1] "There is perhaps no branch of the jurisdiction of a Court of Equity, more delicate, than that which goes to restrain a legal right. Where, therefore, a condition of forfeiture is annexed to an agreement, for the purpose of enforcing its performance, the Court is extremely cautious in applying relief. The principle by which it is actuated is, that one party ought not to take advantage of a legal right, where its rigid exercise would produce loss and injury, if he can have the full benefit of his contract as originally framed; and the ground of its interference is the compensation for loss and injury arising from the non-performance which it is enabled to afford." Jeremy on Equity, page 471.

[2] The distinction between a penalty and liquidated damages has been frequently discussed in the United States. Where a purchaser of

ted merely to secure the enjoyment or performance of a collateral object, the latter is considered as the intent of the instrument, and the penalty as only designed to secure its due performance, or the damage really incurred by its non-performance, and Courts of Equity will interpose to prevent its full exaction. In every such case, the true test to ascertain whether relief can or cannot be had in Equity, is to consider whether compensation can be made or not. If it cannot be made, then Courts of Equity will not interfere. If it can be made, and the penalty is intended merely to secure the payment of money, then they will grant relief upon the payment of the principal and interest.

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fourteen city lots, covenanted, in consideration of having the property conveyed to him for only $21,000, that he would, by a certain day, erect on the lots, two brick houses of specified dimensions, or, on default thereof, pay to the grantor on demand, the sum of $4000; it was held, that the sum specified was not a penalty, but should be deemed part of the contract price of the lots, and that on failure to erect the houses, the covenantee was entitled to recover the specified sum, as *liquidated damages*, and could not be limited merely to actual damage, sustained from the non-erection of the houses; 26th Wend., 630. In 17th Wend., 447, and 22nd Wend., 201, it was laid down, by the Supreme Court, and also the Court of Errors of New York, that whether a sum agreed upon by the parties, as the measure of damages for the violation of covenants, shall be considered as *liquidated damages*, or only as a penalty, depends upon the meaning and intent of the parties, as gathered from a full view of the provisions of the contract, and the terms used to express such intent. Where it is doubtful whether the sum inserted was intended as a penalty, or as *liquidated damages*, it will be considered in the nature of a *penalty;* especially if the payment of a certain damage, less than the whole sum, is provided for by the instrument; but where the sum applies as well to stipulations, where the damages in case of breach must necessarily be uncertain, as to stipulations, where the damages would be certain, it will be regarded as liquidated damages, and not as a penalty. Where the plaintiffs gave $3000, for the patronage and good will of a newspaper establishment, and $500, for the type and printing apparatus, and the defendants covenanted that they would not publish, or aid in publishing a rival paper, and fixed the measure of damages, at $3000; the case, from the uncertainty of arriving at a correct conclusion as to the amount of damages, was a proper one for the application of the rule, that the sum agreed upon, should be regarded as stipulated damages, and not as a penalty. See also, 1 Gall. Rep., 160; 1 Wash. C. C. Rep., 1; 9th Cranch, 104; 7th Wheat., 13; 6th Black., 206.

It is true, that interest for the delay of payment, may not always furnish an adequate compensation, yet it is a certain and general rule, adapted to ordinary circumstances, and prevailing as well at law as in Equity. If the penalty however, was designed to secure the performance of some collateral act or undertaking, Courts of Equity will retain the bill, and direct an issue of *quantum damnificatus;* and grant relief upon payment of the damages which may be awarded. Courts of Equity proceed upon the principle, that, as the penalty is a mere security, and as the party recovering his money with interest, or his damages, obtains all he could have expected, or is entitled to, the other party ought not to be permitted to avail himself of a mere technical right for the purposes of oppression. But they administer a mutual justice, and therefore, where an obligee has been prevented by unfounded and protracted litigation, from prosecuting his claim at law, until the penalty is no longer adequate to secure his rights they will grant a relief commensurate with the original extent of his demand. Thus, when the obligee of a bond has been delayed by the obligor in obtaining a judgment at law, Courts of Equity will decree the payment of all the interest due, although it may exceed the penalty.

2. To what extent do Courts of Equity relieve against forfeitures?

An equally liberal rule formerly prevailed in reference to forfeitures, although the act or omission was voluntary, if compensation could be made. It is still admitted, that wherever the condition or forfeiture, is merely a security for the non-payment of money, such as the right to re-enter for non-payment of rent, there, it is treated as a penalty. But a distinction has been established, at least in England, (although it is condemned by high authority, both there and at home,) in the case of forfeitures arising from the breach of any other covenants of a collateral nature, and Courts of Equity will not ordinarily interfere, but will leave the parties to their remedy at law.[1] Where a penalty or

[1] 2 Edw. Chy., 138; 7th Paige, 350; 6th Ohio, 50; 5 Munf., 495; 1 Call., 533; 2 J. Ch. R., 526; 4 Johns. Chy. Rep., 431; 7th Paige, 350; 8th Paige, 425. Equity will relieve against penalties and forfeitures,

forfeiture has been imposed for public or corporate purposes, Courts of Equity will not interpose on considerations of policy. Thus, they will not relieve a stock holder, who has forfeited his interest in a corporate company by failure, to comply with the prescribed terms, as to the payment of his stock.

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when the matter admits of compensation, whether the condition on which they depend be precedent or subsequent; 3rd Gill & J., 265. In 2nd J. C. R., 526, it is said that Chancery gives relief against penalties or forfeitures where the case admits of certain compensation. But it is afterwards stated, that relief in Equity, upon forfeitures, is confined to cases, where the forfeiture has been the effect of *accident*, and the injury is capable of compensation, though the general rule formerly, was to relieve the party, wherever compensation could be made in damages; 4 J. C. Rep., 431. A Court of Equity will not readily permit an advantage to be taken of a forfeiture, arising merely from a lapse of time specified for performance; but on the contrary, it is the constant practice in proper cases, to relieve against such forfeitures, on making adequate compensation; 4 Munf., 332. It is a fundamental rule with Courts of Equity, not to assist in the recovery of a penalty or forfeiture, or any thing in the nature of a forfeiture; 4 J. C. R., 415; 7th Paige, 350.

CHAPTER XXXV.

INFANTS.

1. JURISDICTION OF CHANCERY OVER INFANTS.

1. What jurisdiction does Chancery exercise over infants?

The jurisdiction which has been exercised over the persons and property of infants in England, by the Court of Chancery from the most ancient times, seems to have arisen from a delegation of the rights and duties of the crown; the king, as parens patriæ, being considered the universal guardian of infants. Courts of Equity are not willing to be burthened with the maintenance of all the infants in the kingdom, and do not ordinarily interfere unless they possess some property which may require protection; in which case they give to their interests a vigilant attention. If the infant has no guardian, they will appoint one; if he has a guardian, who is unfaithful to his trust, the Court in its discretion may either remove him, or restrain him from the commission of any act to the prejudice of the ward.[1] They may even take an infant from the custody of his

[1] This jurisdiction was formerly pushed to an extravagant length in England. The Court would interfere sometimes, for the purpose of securing to a child an education in the religious faith established by law. Thus, while the penal laws against Roman Catholics were in force, it was considered to be the duty of the Court of Chancery, by analogy to the Statute Law, to see that all infants over whom it had power, should

parent, when his morals are likely to be contaminated, his education neglected, or his property wasted. However delicate the exercise of this jurisdiction, it is absolutely essential to the well being of society, and is too firmly established to be shaken. Where, however, the Court withdraws a child from his parent, and commits him to the care of another guardian, it will give directions that no obstacles be opposed to any reasonable communication, or interchange of affection between them. Where a contention for the custody of a child arises between father and mother, the Court must consult the interest of the infant; and although the father has in general the better right, yet his claims yield to those of the mother, when the infant is of very tender years.[1]

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be brought up in the Protestant religion. A case is reported in which Lord Cowper ordered a Roman Catholic girl of fourteen, to be sent to a Protestant school, evidently with a view to her conversion. But a great change has taken place in the practice of the Court on this subject. In the case of Lyons *vs.* Blenkin, 1 Jacob. Rep., 256, on an application for the custody of an infant, the Lord Chancellor said, "with the religious tenets of either party I have nothing to do, except so far as the laws of the country call on me to look on some religious opinions as dangerous to society." The jurisdiction thus pointed out, was exercised in the case of the poet Shelley, who was restrained from directing the education of his children, on the ground of his atheistical and irreligious opinions. The order was made in that case, notwithstanding a suggestion that the pecuniary interests of the children might be unfavourably affected by it, the Court considering interests of higher importance to be involved.

[1] By the common law, the father has a right to the custody of his children, during infancy. In whatever principle this right is founded, whether it results from the very nature of parental duties, or from that authority which devolves upon him, by reason of the guardianship by nature or nurture, technically speaking, its existence cannot now be brought into controversy. This right is not, however, unlimited, for whenever it is abused by improper conduct on the part of the parent, Courts of law will restrain him in its exercise, and even take the custody permanently from him; 1 Mason C. C. R., 78. The power of a Court of Chancery to determine the proper person to have the custody of a child, has been frequently considered in America, as well as the manner in which it is to be exercised. See 6th V. E. How., 406; 19 Wend., 15; 8th Johns. R., 328, 6 Maine's. Rep., 462; 2nd Bland. Rep.,

The filing of a bill, to which an infant entitled to property is made a party, is considered to have the effect of bringing him under the especial cognizance and protection of the Court, and of making him, what is termed a ward of Chancery. In all these cases, and where the guardian is one of its own appointment, the Court of Chancery stands in *loco parentis* to the infant, and will not permit any act to be done affecting his person, property, or condition, without its express or implied direction. It will, on petition, direct an allowance for the education and maintenance of a child, suitable to his future expectations, and in all things will vigilantly superintend the guardian, in his care of the ward's interests. The guardian may not ordinarily change the character of the ward's estate; but where it has been done manifestly to the benefit of the ward, Courts of

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563; 3rd Mason Rep., 482; 13th J. R., 418; 16th Pick., 203; De Hauteville's Case, (published in pamphlet form,) 3 Hill, 396; 25th Wend., 64; 8th Paige, 47.

The case of Foster & wife, *vs.* Alston, 6th V. E. How., 406, is one in which this subject is examined both by counsel and Court, with great learning. It was there held, that on a writ of *habeas corpus* by a guardian to regain possession of his ward, who has been forcibly taken from him by the parent, the Court cannot take jurisdiction, unless the ward is restrained of liberty. Where the ward was forcibly taken from thepossession of the testamentary guardian by the mother, and it appeared that the ward's interests and inclinations would be consulted by remaining with the mother, the Court on a proceeding by writ of habeas corpus, will not restore the ward, although it does not appear that the guardian has in any way abused his trust, or is incompetent to discharge it. Upon a *habeas corpus*, the object of the Court is to release the infant from all improper restraint; and not to try in that summary way the question of guardianship, or to deliver the infant over to the custody of another. The infant, if competent to form and declare an election, will be allowed to go where he pleases, and if too young to form a judgment, the Court will exercise its judgment for him. Ex parte Wolstonecraft, 4 J. C. R., 82. In Pennsylvania it has been held that the Court at their *discretion* may decide the question of guardianship, and the delivery of custody, if under the circumstances it ought to be done. 5 Binn., 251; 2 Serg. & Raw., 174; 1 P. A. Browne's Rep., 143. This subject was most elaborately examined in the case of the People *vs.* Mercein, 8th Paige's Rep., 47. Among the interesting points decided in that case were these. "The powers of the Chancellor to issue a

Chancery will protect him from responsibility.[2] But to prevent the guardian from altering the character of the fund to the prejudice of those who as heirs or distributees of the infant, would be entitled to it on his death, it is the constant rule of the Court to consider the property real or personal, and as such descendable or distributable, not according to its state at the infant's death, but according to its original character.

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habeas corpus to inquire into the cause of the detention of an infant does not depend solely on the revised statutes, but is an inherent power derived from the common law. The right to the guardianship of an infant cannot be tried upon a *habeas corpus*. And the Court of Chancery upon such a writ will exercise its discretion, in disposing of the custody of the infant upon the same principles, which regulate the exercise of a similar discretion by other courts and officers who are authorised to allow the writ in similar cases. In the exercise of this discretion, the natural right of parents to the custody of their infant children is not to be disregarded. Where the wife is not living in a state of separation from her husband which can be considered as illegal or immoral, the custody of an infant of tender years, will be given to the mother, wherever it appears that the interest of the infant demands it; and such is the case of infants only twenty-one months old. Where no sufficient reasons exist for depriving the mother of the care and nurture of her infant child of very tender years, it would not be a proper exercise of judicial discretion to take the child from the custody of the mother, for the purpose of delivering it to the father. Where the child, in consequence of its tender years, is incapable of exercising any volition as to its future residence, the Court before whom it is brought upon a habeas corpus, will decide that question for such child, and will have regard not only to immediate safety, but permanent welfare."

[1] 1 Brok., 356. The powers of a guardian in Chancery over the estate of his ward are examined by Chancellor Kent, in the case of Field *vs.* Schieffelen. 7th J. C.R., 150; see also 3rd Yerg., 77; 3rd Dessau., 18. In many of the States there are statutory provisions authorising the sale of an infant's real estate; but so jealous and strict were the rules of the common law upon this subject, that to this day there is no mode of procuring such a sale in England. Even upon the debt of the ancestor for which lands may be made liable, the parol might have demurred, until the act of William IV., C. 47. In partition, the conveyance of the infant is respited, until he comes of age; and upon a mortgage foreclosure, it was a new and bold, though wise step of Lord Eldon, to order a sale, upon ascertaining that the benefit of the infant

The Court of Chancery is very careful to guard against the improper or unsuitable marriage of its ward, and will punish all persons aiding or abetting such a marriage without its express sanction, for a contempt. Where the marriage has been celebrated, it will not discharge the husband from commitment for the contempt, until he has made a suitable provision for the wife.[1] In a flagrant case, it may express its disapprobation, not only by the punishment which it inflicts, but by framing the settlement in a manner so unfavorable to the offender, as would be contrary to the policy of the law, with reference to such instruments in ordinary cases.

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would be promoted. The only approach in England to the American practice, is under the statute 1 William IV., Ch. 65: authorizing a Court of Chancery to grant leases of infant's lands, when it shall appear to be for their benefit. Vide Hoffman's Chancery Practice, Vol. 2, page 209.

[1] Where the husband has married a ward in Chancery, without the consent of the Court, or her legal guardians, the Court has jurisdiction to interfere, on the application of the friends of the infant wife, even without her consent, to restrain the husband and his creditors from intermeddling with her estate, until a proper settlement is made for the support of the wife and the issue of the marriage; 6th Paige's Rep., 366.

CHAPTER XXXVI.

IDIOTS AND LUNATICS.

1. JURISDICTION OF EQUITY OVER IDIOTS AND LUNATICS.

1. What jurisdiction do Courts of Equity exercise over idiots and lunatics?[1]

The jurisdiction is a branch of the prerogative of the crown, usually, but not necessarily, committed to the officer holding the

[1] Imbecility of mind, whether constant from the party's birth, or the consequence of old age, or accident, may, though not strictly amounting to lunacy, be made the foundation of a commission, in the nature of a writ *de lunatico inquirendo*; 8th Ves., 65; 19th Ves., 286; 4 Russ., 182. The same doctrine was recognised by Chancellor Kent, in the matter of Barker, 2nd J. C Rep., 232; and by the Court of Appeals of Kentucky, in Naylor *vs.* Naylor, 4th Dana, 343. "To constitute, however, a case of unsoundness of mind, which will justify the Court in taking the person and property of a freeman into its possession, and committing them to the custody of another, his mind must be so far impaired that if it had never been elevated above that state of capacity, from his birth, it would have constituted a case of idiocy. But mental imbecility may exist in various degrees between absolute idiocy, and the ordinary state of mental capacity, as it exists among mankind in general. To authorise the Court, therefore, to act on an inquisition, upon the presumption, that the mind had become so far impaired as to resemble a state of idiocy, the jury should, in terms, find that he is of *unsound mind*, and mentally incapable of governing himself, or managing his affairs." Chancellor Walworth, in the matter of Morgan, 7th Paige R., 236.

great seal; from whose orders, there lies an appeal directly to the King, in council. Upon a proper petition, the chancellor, acting under the special warrant of the crown, appoints commissioners, who summon a jury to try the fact of lunacy. As the determination of this question affects the liberty of the subject, the inquisition is always made by a jury. If the party is found a lunatic, by the inquisition, it may still be avoided by a traverse, a right, which under the II. Edw., 6, may be exercised by all persons aggrieved.[1] On a traverse, the record goes into the King's Bench, which either gives judgment, or grants a new trial. On the return of the inquisition, the custody of the lunatic's person and estate devolves on the crown; and the chancellor appoints committees to take care of either or both. The chief consideration in the choice of the committee of the person, is the comfort of the idiot or lunatic; and with reference to the committee of the estate, that proper securities are taken against its mismanagement.[2] As a general rule, the committee

[1] In the matter of Wendell, 1 J. C. R., 600, it was held, that Chancery having the whole jurisdiction in regard to lunatics and idiots, will direct the course of proceeding on the traverse of the inquisition returned, in such manner as may be most useful and expedient, so as best to inform its conscience, and afford the safest conclusion as to the fact of lunacy. The lunatic may be brought into Court, after the inquisition is returned, and an enquiry be made by inspection, as to the fact of his lunacy, or an issue be awarded, to ascertain by a verdict at law, its existence or continuance. The most usual and proper course is, to have the issue made up and prepared for trial, under the direction of the Court, instead of delivering over the record and traverse, after the Attorney General has joined issue thereon, as practised in England, under the Statute of II. and III. Edw., 6. In the matter of Tracy, 1 Paige, 580, the Chancellor said, that it was not a matter of course in New York, to allow an inquisition to be traversed, but that it rested in the sound discretion of the Court.

[2] The comfort of the lunatic receives so much consideration from the Court, that though it can never desire to see creditors defrauded of their just demands, no order will be made, for the payment of a lunatic's debts, out of funds in Court, unless it clearly appears that a sufficient maintenance will remain, or is securely provided for him. Until the 43d year of George III., the Chancellor of England, even in his prerogative capacity, had no authority to direct the sale of a lunatic's es-

cannot enter into any transaction or contract, respecting the property of the lunatic, without the authority of the Court.

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tate for the payment of his debts; and even since the enactment of a statute, in that year, giving such power to the Chancellor, he will not take cognisance of a bill to establish the indebtedness, when it is a question of controversy, or even of reasonable doubt, but always refers the decision to a common law tribunal, where the appropriate remedy would have been in such Court, had there been no lunacy; 12th Ves., 384. In Kentucky, it has been held, that Courts of Chancery have no authority to decree a sale of any portion of the real estate of a lunatic, for payment of his debts; 2 B. Monroe's Rep., 308. It is otherwise in New York; 2 J. C. R., 242; 7 Paige, 312. The crown, it is said, takes a very different interest in the estate of an idiot, from that which it can claim in the estate of a lunatic. An idiot, according to judicial definition, is one, who from his nativity, by a perpetual infirmity, is *non compos mentis;* and the entire profits of the estate, both real and personal, of such a person, during his life, and subject to a provision for his maintenance, are at the absolute disposal of the crown. But of the estate of a lunatic or *non compos*, who once possessed sound memory, "the King shall only have the custody, and therewith maintain the lunatic and his family, not taking any part of the profits to his own use," and upon the recovery or death of the lunatic, shall restore the whole of the property, and all surplus property, derived therefrom, in the first case, to the party himself; in the latter alternative, to his heirs, executors, or administrators; Hoveden's note to 1 Ves., jr., Exparte Bromfield, 463.

CHAPTER XXXVII.

MARRIED WOMEN.

1. HOW CONTRACTS BETWEEN HUSBAND AND WIFE ARE VIEWED IN A COURT OF EQUITY.
2. MANNER IN WHICH A FEME COVERT MAY ACQUIRE A SEPARATE PROPERTY.
3. POWER OF A FEME COVERT OVER HER SEPARATE PROPERTY.
4. WIFE'S EQUITY TO A SETTLEMENT.
5. WHEN COURTS OF EQUITY WILL ALLOW ALIMONY TO A MARRIED WOMAN.

1. In what light do Courts of Equity regard contracts between husband and wife?

Courts of Equity have greatly meliorated the harsh and absurd rules of the common law, in reference to married women. The fiction that by the marriage union they become one person for all purposes; that all previous contracts between them, to be performed during coverture, are thereby extinguished; and an absolute incapacity to enter into any future agreement induced, is controlled, wherever it would defeat the ends of justice.[1] Thus, a bond given by a husband to his wife, before

[1] A wife may contract with her husband, even by parol, after marriage, for a transfer of property from him to her, or to trustees for her, provided it be for a bona fide and valuable consideration; and she may have that property limited to her separate use. This was so held in the case of Livingston *vs.* Livingston, 2nd Johns. Chy. Rep., 537; and as

marriage, although void at law, will be supported in Equity, where it is the only means of giving effect to the intention of the parties. So, all ante-nuptial agreements, founded on the consideration of marriage, and all post-nuptial agreements, where the wife parts with a separate estate, or relinquishes her interest in her husband's property, or even disposes of a contingent interest, if bona fide made, will be valid, not only as between the parties, but as against creditors. So, where a wife has a separate estate, she may become the creditor of her husband, and entitled to all the privileges of that character.[1] Courts of Equity adhere to the old rules of the common law, in reference to the incapacity of the parties to contract with each other, where the subject matter of the contract, is an agreement to separate; and upon considerations of public policy, pronounce a deed of separation, between husband and wife, without the intervention of trustees, to be utterly void. They will not only support contracts, made fairly, and on a good consideration, between husband and wife, but all gifts from the husband

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the wife died, in that case, after the contract had been executed on the part of the husband, and before it had been executed on the part of the wife, the infant children of the wife, were directed to convey, as infant trustees, by their guardian, the lands which their mother, by agreement with her husband, had contracted to sell; Kent's Com., vol. 2, page 166; 7th Pick., 533; 3rd Paige, 440; 3rd J. C., 523; 2nd Brock., 311; 7 J. C. Rep., 57; 4 Desau., 227; 4 Munf., 251; 6 Munf, 1; 2 Rand., 533.

[1] It is well settled law, that where the wife pledges her separate estate, or her reversionary interest in her real property, for the debt of her husband, she is entitled to the ordinary rights and privileges of a surety; 3rd Paige's Rep., 614. But where the wife joins the husband in a mortgage of his real estate, she is not entitled to have the mortgage satisfied, exclusively, out of the husband's interest in the premises; so as to give her dower in the whole premises, notwithstanding the mortgage; and not in the Equity of Redemption merely. For, strictly speaking, the wife has no estate or interest in the lands of her husband during his life, which is capable of being mortgaged or pledged for the debt. Her joining in the mortgage, merely operates by way of release or extinguishment of her future claim to dower, as against the mortgagee, if she survives her husband; but without impairing her contingent right of dower in the Equity of Redemption; 9th Paige's Rep., 200.

to the wife, which are reasonable in themselves, and not prejudicial to the claims of creditors. When such a gift can be fully established, Courts of Equity will protect it in the possession of the wife, from the claims of the husband or his representatives, and treat it as in all respects her separate property, except as to creditors.

2. How may a feme covert acquire a separate property?

An estate to the separate use of a married woman may be created either before or during marriage. Before marriage, it may be created either by the woman herself out of her own property, or by the intended husband, or by a stranger. During the marriage, it may be created by the husband, or by a stranger, but not by the wife; as she would then be rendered incapable of disposing of any property, which had not been already limited to her own sole use. A woman may, before her marriage, vest her entire fortune in trustees for her own use, so as to deprive her intended husband of any share in it, or control over it, provided, it is free from fraud; and she may make such a settlement of it, as may enable herself to carry on trade with her own money, and not render it, or the produce of it, liable to his debts. An agreement entered into before marriage, to carry on trade, as a sole trader, through the medium of trustees, will be supported at law; and in Equity, although no trustees have been interposed. Although at one time, considerable doubt existed, whether a gift to the separate use of a married woman could be maintained against the legal rights of her husband without the interposition of a trustee, it now seems unimportant whether the limitation be to herself only, or to trustees for her: for although the common law vests her personal property in her husband, and the rents of her real estate during his life; yet, it is settled, that Equity will consider him a trustee, for the benefit of his wife, and will enforce a compliance with the intentions of the donor. In the case of a gift from the husband to his wife during coverture, without the interposition of a third person, there is more difficulty in establishing its real character, as the evidence that the husband has divested himself of his property, must be clear and unequivocal.[1]

[1] The case of Huber *vs.* Huber's administrators, furnishes a striking

Some nice distinctions have been taken as to the words, which will be sufficient to raise a trust, for the separate use of a married woman. This claim on the part of a married woman being against common right, the instrument under which it is made,

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illustration of the modern doctrine. It was there held, that where money comes to a feme covert in right of her former husband, and the second husband borrows it, and gives her a note for the amount, she may set up that note in Equity, after his death against his representatives. Judge Grimke says, "The intervention of trustees is not necessary. Trustees afford a great protection to the wife, in the event of the husband becoming embarrassed. They interpose a protection against the too easy alienation of her property under such circumstances, and therefore it is very usual to convey the property to them for her use. But as to such property, the wife is to all intents and purposes a feme sole, even during the life of her husband. But in this case, John Huber was not a wealthy man, and he has not adopted the form of a deed of settlement to carry into effect his intentions, nor was it necessary that he should do so, if we are satisfied that it was his design to give this money to his wife. A note from a husband to his wife is a very unusual thing, and this very circumstance in this case, is in consequence of its uncommonness, a convincing argument that he intended to withdraw the money of which it was the evidence, from his control, and to give it absolutely to his wife. There is no meaning to the transaction, unless this interpretation is put upon it, and when with this circumstance is combined the fact, that the money was not originally his, the presumption as to his intent is turned into a certainty, and enables a Court of Equity to fasten upon it, in order completely to further his design. The cases are sufficiently numerous to show that this is a correct conclusion. In Lucas *vs.* Lucas, 1 Atk., 270., Lord Hardwicke held, that in Chancery, gifts between husband and wife would be supported, although at law the property is not permitted to pass. And in Hanning *vs.* Style, 3 P. Wms., 337, it is held, that where a husband voluntarily and after marriage allows the wife, for her separate use, to make profit of various articles beyond what was used in the family, but of which the wife saves $100, which the husband borrows, and dies, the Court will uphold the agreement. These two cases are very strong, and greatly resemble the present. I do not know what more we can require, if we are in search of light from adjudged precedents, unless in place of a most striking analogy, we demand an absolute and exact identity of the cases in all their parts. There are numerous other cases, which establish the same doctrine, and which, in spite of the strict rules of the common law, have declared that the husband and wife, instead of being immutably one and the same person, may have separate wills. And this doctrine is upheld for the purpose

must clearly speak the donor's intention to bar the husband, else it cannot be allowed.[1] The strongest evidence of intended generosity and bounty towards the wife, will not be sufficient to give her a separate estate, unless, in addition, language be used by the donor, clearly expressing the exclusion of the husband; or else directions be given with respect to the enjoyment of the gift, wholly incompatible with any dominion of the husband. Whenever a trust of property is expressed in terms, to be for "the sole and separate use of a married woman," there no question can arise, as to the intent of the donor to exclude the husband from any participation in it, because this is the proper technical phraseology, universally recognised and adopted by conveyancers, for the expression of such a meaning. There are, however, other expressions, which though not strictly according to this established form, are equivalent; such as "to her sole use or disposal," "to her sole use and benefit," or "not to be disposed of by her husband, without her consent."[2]

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of maintaining, and not to destroy or impair, the family relation." The authorities, however, are not unanimous.

In Simpson *vs.* Simpson, 4 Dana's K. Rep., 141, it was held, that though a valid agreement for a separation between husband and wife, and for a separate allowance for her support, might be made through the medium of a third party as a trustee for the wife, and by whom the contract may be enforced; yet that where there was no third party, no suit could be maintained either at law or in Equity, on such a contract. The Court thought the judiciary had no power to move one step in advance of the legislation, and uniform judicial precedents on the subject. But if before marriage, and in contemplation of marriage, the husband conveys directly to his intended wife, without the intervention of a trustee, personal property, and she marries, and dies without issue of the marriage, it was held that the property descended to her heirs, and that the marital rights of the husband did not attach. 2 Hills., S. C. C. R. Vide also ante, page 178.

[1] It has been decided in reference to the property conveyed by a post-nuptial settlement, that the income or profit follows the nature of the principal estate, and cannot be taken by the husband or his creditors, but belongs to the wife, and is subject to her control and disposition. It is her separate property, and when invested by her, will be protected for her use. Into whosoever's hands it comes, it is clothed with the trust for her, and not for her husband. 4 Mason's Rep., 444.

[2] In order to vest property to the separate use of the wife, technical language is not necessary. 8th Yerg., 33; 2nd Port., 463; 4th Des., 550.

Gifts to a married woman, of jewelry, private ornaments, etc., stand upon peculiar considerations. When coming from her husband, they constitute a portion of her paraphernalia, and on a deficiency of assets, will be liable to his creditors. In the case of a stranger, the very nature of the gift raises a powerful presumption, that they were designed for the exclusive use of the donee, and Courts of Equity will, therefore, protect them from the husband's creditors.[1] The question has been frequently discussed in England, as to how far a clause in a gift or deed of settlement upon a wife, against anticipation, designed to prevent her from depriving herself of its benefit, through marital, or other influence, is valid and obligatory. After some fluctuation in the decisions, the English Courts, in the recent case of Tullet *vs.* Armstrong, 1 Beavan, 1, S. C.; 4 Mylne &

[1] This subject was considered in the matter of Grant, a case arising under the provisions of the late bankrupt act, reported in 2nd Story's C. C. R., 312. The law is thus stated by Judge Story: "Gifts made after marriage, by third persons, may also be expressly given for the sole and separate use of the wife, independent of her husband; and when so given, if the husband consents to her receiving the gifts, he and his creditors are bound by the trust. But the nature of the gift by a third person, may equally as clearly establish the intent, that it is to be in trust, for the sole and separate use of the wife, during the marriage, as if it were positively so expressed; and then the trust will equally attach to, and regulate the gift, and bind the husband and his creditors. Mourning rings, given by third persons, to the wife, since her marriage, are from their very nature and character, purely personal, and for her sole and separate use, as memorials of the dead, and also, of the affections of the living. They are sacred, and cannot be touched, either by the husband, or by his creditors. But gifts made by a husband to the wife, after, and during the marriage, admit of a different consideration, with the exception of her wearing apparel. They are not strictly at law, capable of taking the effect; for the husband and wife, are in legal contemplation, but one person, and therefore, incapable of making gifts to each other. In Equity, it is otherwise, and the husband may make gifts to the wife, of personal ornaments or jewelry, for her separate use, which will be good against his representatives, in case of his death; but not good against his own power to reclaim them during life; nor good against the rights of his creditors to take them in satisfaction of their debts; for here the rule is, that the husband must be just before he is generous."

Craig, 397, have recurred, to what Chancellor Kent calls, "the old and juster doctrine," and it is held, that a devise or bequest, in trust, for an unmarried woman, to her separate use, and with an inability to aliene, was effectual upon any subsequent marriage, both as to the separate use, and the restraint upon anticipation.[1]

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[1] The opinion of the Master of the Rolls, in Tullet *vs.* Armstrong, 1 Beavan, contains a most interesting and elaborate examination of the whole doctrine. It is too lengthy to be quoted at large, but we have extracted a portion, which cannot fail to instruct the student. "The power of alienation, remaining in the wife, the separate estate, unfettered, is no protection against the moral influence of the husband, and many instances have occurred, and daily occur, in which the wife, under the persuasion or influence of her husband, has been, and is induced, to exercise her power of alienation, in his favor, or for his benefit, and thus defeat the protection intended for her. But as the separate estate itself, owed its origin and support to the Courts of Equity, it was understood, that the same Court might so modify it, as to secure the protection which was intended; and accordingly, it was intimated by Lord Thurlow, that if a gift clearly expressed, that the separate estate should be incapable of assignment in anticipation, or of alienation, that intention should be carried into effect; and his Lordship being of that opinion himself, set the example, in a case in which he personally took an interest, and from that time, now, nearly half a century ago, it has been usual to introduce into wills and settlements, a clause, giving to women, real and personal estate for their separate use, independently of their husbands, without power of assignment, by way of anticipation, or alienation; and such clauses, though their operation has been considered to be anomalous, and irreconcileable, with the ordinary legal rules affecting the limitation of estates, and the legal incidents of property, have been repeatedly approved, and carried into effect, by this Court; and their validity cannot now be shaken. I apprehend, that the restrictive clause or fetter, has, in this Court, always been considered, as affecting a modification of the separate estate, and consequently to have its operation only on the married state. It is said, indeed, that before the case of Brandon *vs.* Robinson, 18 Ves., 429, there were some eminent lawyers, who considered that a similar fetter might be imposed by this Court, on property enjoyed by men, and without relation to the married state; but Lord Eldon, in deciding that case, thought proper to state distinctly, that the rule was different, and that if property be given to a man for life, the donor cannot take away the incidents of a life estate, or add a valid clause that he shall not alien it. It cannot be pre-

3. What are the rights and liabilities of a married woman, in Equity, in reference to her separate property?

served from creditors, unless given to some one else in trust. As however, the clause annexing a fetter to the separate estate, is only intended for the protection of married women, and not to restrain the incidents of property, vested in persons under no legal incompetency, it has been determined, that neither of them has any practical operation, whilst the donee is single; it has been considered, that as an unmarried woman is as capable of exercising and enjoying the rights of property as a man is, the property must in her, whilst unmarried, be accompanied by its ordinary incidents. But it has been argued, that if the gift of property for the separate use of a woman, whether intended to be thus fettered or not, becomes vested in her, whilst single, she then possesses immediately, the faculty of disposition, or the power of alienation; and that if she afterwards marries, she, by the fact of marriage, subjects this, like any other property, to the marital power of the husband, and in that way, loses all the protection she was intended to have; and in the arguments which have been used upon this subject, a desultory, or shifting privilege, or fetter attaching on the marriage, and of no practical operation while the woman is discovert, has been treated as a sort of absurdity not to be endured. I confess, however, that I see no absurdity, but considerable convenience, in a law affording peculiar protection to the property of married women; which affords to them protection, or imposes upon them restraint for their protection, only when they want it; which enables a woman when single and adult, upon deliberation, to settle her property according to her convenience, or if most to her advantage, to forego her protection altogether; and yet guarding against infancy or improvidence, secures her the protection when married, if she has not beforehand, deliberately and designedly renounced it." He then reviews the decided cases, and declares the following propositions, as "the result of the authorities, and of the constant practice of the conveyancers, which great and eminent judges have considered to be no mean evidence of the law. That property given to a woman for her separate use, independent of any husband, may, under the authority of this Court, be enjoyed by her during her coverture, as her separate estate, although the property originally, or at any subsequent period, or periods of time, become vested in her, when discovert. That, in respect of such separate estate, she is, by this Court, considered as a feme sole, although covert. Her faculties, as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this Court, for her protection. The words 'independent of a husband,' whether expressed or implied in the terms of the gift, mean no more, than that this Court will not

A wife is treated in Equity, for most purposes, as a *feme sole*, in reference to her separate estate. The Court will consider her so far, a distinct person from her husband, as to suffer her to be sued by him, or to sue him, or to be sued by, or to sue any other person, in respect to that property. Indeed, Lord Mansfield attempted to introduce this equitable principle into Courts of common law, and to make a feme covert, having a separate estate, and living apart from her husband, liable in an action for a debt contracted upon its credit. Although that judgment was afterwards pronounced by Justice Buller, to be worthy of religious and sacred observance, and founded upon good sense, and adapted to the transactions, the understanding, and the welfare of mankind, it has been long since overruled, and the only redress whicha credit or of a feme covert can obtain, is in Equity. And even there, no personal decree can be rendered against her; her separate estate only, may be subjected. But, a feme covert is not so far considered as a feme sole, as that her general engagements will bind her separate property. She must by some act, clearly indicate an intention to charge her separate estate, and some very artificial distinctions have been taken, as to the circumstances, which will be sufficient to establish such an intention. When she executes a bond, or note, or accepts a bill, as these would be nugatory, if done by a feme covert, without any reference to her separate estate, it is regarded as furnishing evidence of a contract, or appointment to charge it. But this

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permit the marital power of the husband, to be used in contravention of the enjoyment of the property, according to the terms of the gift. If the gift be made for her sole and separate use, without more, she has during the coverture, an alienable estate, independent of her husband. If the gift be made for her sole and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate, independent of her husband. In either of these cases, she has, when discovert, a power of alienation; the restraint is annexed to the separate estate, and the separate estate, has its existence, only during coverture."

This subject is considered in the American Law Magazine, vol. 3 page 273; 2nd Dev. & Batt., 480; 9th Paige, 363; Kent's Com., vol. 2, page 170, and Clancy on Husband & Wife, a work to which we are largely indebted for the matter of this chapter.

presumption has not as yet been extended to her general engagements, although such is the tendency of the modern decisions.[1]

It is the general rule that a feme covert in respect to her separate property may deal with it as she pleases, and exercise over it, every right which she would possess, if she was unmarried. The Courts are not disposed to lock up the separate property of a feme covert, by restricting her right of disposition. In the case of Jacques *vs.* the Methodist Episcopal Church, (3 J. C. R., 86; S. C., 17 J. R., 548,) it was declared thata feme covert as to her separate property was to be regarded in a Court of Equity, as a *feme sole*, and might dispose of it without the assent and concurrence of her trustee, unless her power of disposition be restrained by the instrument under which she acquired it; and the same doctrine seems generally to prevail in this country.[2] As to personal property, and the income of her real estate, when given to the separate use of a married woman, without any qualifications attached to the gift, she has in Equity a full power to dispose of them at her pleasure. As to her real estate, if no mode of disposition is prescribed by the instrument under which she claims, she can only part with it by

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[1] "I own," says Lord Brougham, in 3rd Mylne & Keene, 309, "I can conceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is, in Equity, taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding, that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing, where that act requires none? Is there any Equity, reaching written dealings with the property, which extends not also to dealing in other ways; as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play, be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle." It was held in Owen *vs.* Dickinson, 1 Craig & Phillips, 48, that the separate estate is liable in Equity, to her general engagements, as well upon an implied understanding, as by a written obligation.

[2] "I apprehend," says Chancellor Kent, after an elaborate review of the English cases, "that they are so floating and contradictory, as to

adopting those forms of conveyance, which the law allows to remove the disability of coverture.[1]

Where the wife has a power to dispose of her estate by appointment, or otherwise, she may bestow it upon her husband, as well as a stranger, provided the Court is satisfied that he has exercised no undue influence over her.[2]

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leave us the liberty of adopting the true principle of these settlements. Instead of holding that the wife is a *feme sole* to all intents and purposes, as to her separate property, she ought only to be deemed a feme sole, *sub modo*, or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power except what is specially given, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general; and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of the law. These settlements are intended to protect her weakness against her husband's power, and her maintenance against his dissipation. Perhaps, we may say, that if the instrument is silent, as to the mode of exercising the power of appointment or disposition, it intended to leave it at large to the discretion or the necessities of the wife; and this is the most that can be inferred." The rule laid down in this case was discussed at great length in the case of Morgan *vs.* Elam, 4th Yerg., 385, and the principles therein declared, affirmed and sanctioned. To the same effect have been the decisions in Pennsylvania and South Carolina. 1 Rawle, 231; 3 Dessaus., 417; 2 Wharton, 11. See also 2 Hills, C., 214; 2 Bland., 544, 5 J. J. Marsh., 230; 7 Gill. & J., 192; 7 Paige, 9, 112; C. W. Dudley, Equity, Cas., 128. A more enlarged doctrine was declared, in 2nd Leigh., 183, and a feme covert is held to have the right of disposing of her separate personal estate, and the profits of her separate real estate, in the same manner, as if she were a *feme sole*, unless her power of alienation be restrained by the instrument creating the separate estate. The subject is considered in 8th Leigh., 20; 9th Leigh., 200.

[1] In the case of Bradfsh *vs.* Gibbs, 3 J. C. R. 539, it was held that "to enable a *feme covert* to dispose of her real estate, in Equity, it is not necessary that the legal estate should be vested in *trustees;* but a mere agreement entered into before marriage, with her intended husband, that she should have power to dispose of her real estate during coverture, will enable her to do so."

[1] See 3 J. C. R, 86; 539. In Gardner *vs.* Gardner, 22nd Wend.,

4. What is understood by the wife's equity to a settlement?

Courts of Equity do not controvert the legal title of the husband to the wife's personalty, or to the rents and profits of her land: on the contrary, they admit the law upon this subject to its fullest extent; for where the husband has once acquired possession of that property, though it had been of an equitable nature, they will leave him in its undisturbed enjoyment. But where an application to a Court of Equity is necessary, to obtain possession of the wife's property, or where her fortune is within the reach of the Court, a reasonable provision will be required to be made out of it, for her and her children. This is termed the wife's Equity.[1] It has been extended beyond the applica-

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526, it was held, that a feme covert in regard to her separate estate, may become the debtor of her husband, for money borrowed of him to improve such estate, and payment of the debt thus contracted will be enforced in Equity, as a lien upon the estate, unless by the terms of the donation, the *feme* be prohibited from charging the estate. A debt thus contracted by the wife may be discharged by a *donatio causa mortis*, as by the declaration of the husband that the money was hers, and by destroying the bond, the evidence of the debt.

[1] 2 J. C. R. 206; 6th Johns., Chy. R., 33; 5 J. C. R., 464; 4th Paige, 66; 7th Paige, 462; 3 Cowen., 590; 1 Gill & John, 282; 1 Dessau., 196, 263, 567; 1 Meigs., 551; 2 McChord's, Ch. R., 368; 7 Munroe, 660. Numerous American authorities are cited in the notes to 2nd Ves., jr., 191, and 5th Ves., 517; Sumner's edition.

The Courts of Pennsylvania have no authority to insist on such a provision for the wife. 1 Bin., 358; 1 Ashmead, 323; and those of New Hampshire only to a limited extent; 9 N. H. R., 309. In Gallego *vs.* Gallego's Executor, 2nd Brock., 285; Judge Marshall commenting upon the wife's Equity, remarks, "This rule never has been recognised so far as we are informed in the Courts of Virginia, but it has never been denied, and we can conceive no principle on which it should be denied. That those who ask Equity should do Equity, is a fundamental rule of the Court, which enters into and mingles with all its decisions; and that the property of a married woman should not be taken from her without making some provision for her maintenance, is as equitable in Virginia as elsewhere." In that case, the important principle was established, that a relinquishment by the husband of his marital right to a legacy, bequeathed to his wife, is valid as to the creditors of the husband, and a Court of Equity will not interpose its authority to

tion of the original principle to putting a positive restraint upon the husband, in the instance of his proceeding in the Ecclesiastical Courts for the recovery of the wife's legacy, in respect of which, a trust is implied, until a provision has been made for her.

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compel the husband to reduce the legacy into his possession, for the purpose of subjecting it to their claims." The reasoning of the Chief Justice may be most appropriately transferred to our own pages.

"The common law of England identifies the wife so entirely with her husband, as scarcely to tolerate the idea of her separate existence while they live together. She cannot acquire personal property by a direct conveyance to herself. Her interest is, by act of law, almost in every instance, transferred to her husband, and becomes vested in him. But this rule does not apply to personal estate, to which a female is entitled before marriage, and which has not been reduced to possession. This remains her property, and does not vest in the husband by the marriage. The marital right does not extend to the property while a *chose in action*, but enables the husband to reduce it to possession, and thereby acquire it. The property becomes his, not upon the marriage, but upon the fact of his obtaining possession. The right of the legatee does not originate in the common law, and is not governed by the old rule, which disables the wife from taking for her own benefit. It is a right which cannot be asserted at common law, and can be sustained only in a Court of Equity. The personal estate of the testator rests in the executor for the payment of debts, who is a trustee for the legatee, after the primary trust for creditors shall be satisfied. As Courts of Equity grew up under the control of civilians, they have adopted the principles of the civil law, which views the rights of married women with much more liberality, than the common law. Legacies, therefore, bequeathed to a married woman, have never been classed with conveyances at common law, but with *choses in action*, and vest an equity in the wife herself, in which the husband participates so far only, as to assert her title in a Court of Equity. The property does not become his, nor is it subject to the liabilities which attach to that which is his, until it shall be reduced to possession. Till then, his creditors have no claim to it. If he dies, living the wife, before reducing it to possession, his power is not transmissible to his representatives, but dies with him. Since the claims of the creditor extends only to the property of the debtor, it cannot reach a legacy, until it becomes his property. It follows, then, not only because mere rights cannot be taken in execution without the aid of some special legislative provision, but because, also, there is no title in the husband to the thing itself, that a legacy not reduced to possession, is not liable for his debts. Can a Court of Equity subject it to them? The books furnish no case

The Court will not ordinarily interfere, where the husband is pursuing the common legal remedies, for reducing into possession his wife's personal property; although the propriety of doing so, on all occasions has been suggested by the most distinguished American authority.[1] This Equity will be enforced against the husband or his representatives, and against his assignees, whether general and by operation of law, as in bankruptcy, or special, by the act of the party, as to an individual; and whether the particular transfer was voluntary, or made upon a good and valuable consideration, or in payment of a just debt. There is this distinction to be observed between a general and a special assignee, who is a purchaserfor a valuable consideration, where the interest assigned was capable of immediate reduction into possession. The former who stands in the shoes of the husband, takes the property subject to, the latter takes it discharged from, the wife's right of survivorship. So, it is now established, that where the wife is entitled to this Equity for a settlement, she or her trustee may bring a suit for the purpose of asserting it.

This right of the wife is personal to her,[2] and does not ex-

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in which this naked question has been brought before the Court. This is, of itself, a strong, we think, conclusive argument, against the right. That a creditor has never applied to a Court of Chancery, to interpose in his favor, and subject the *choses in action*, or the equitable rights of the wife, to his claim against the husband, demonstrates the universality of the opinion, that Equity affords no aid in such a case. The assignees of the bankrupt, it is true, are permitted to assert this right; but they represent the bankrupt, as well as his creditors, and the marital rights of the husband are transferred to them. We can find no case, in which creditors have required the aid of the Court to compel the husband to reduce a legacy to possession, or in which a Court has restrained the effect of a previous relinquishment of the marital right on the part of the husband."

[1] Kent's Comm., Vol. 2, page 140; 4 Paige's R., 64.

[2] In addition to the authorities cited by Judge Story, vide 1 Keen., 138; 1 Beaven, 593. The same principles have been recognised in this country. "The doctrine seems to be well established, that when a settlement has been made upon the wife, during her life, it will, upon her

tend to her issue, unless it has been asserted and perfected in her life-time. It may be waived by the wife, or lost, or suspended by her misconduct, as where she lives apart from her husband, in adultery. It attaches to her personal property, whenever it is subject to the jurisdiction of the Court, and is the object of a suit, and whether it was owned by her *dum sola*, or has descended or been devised to her, during coverture. It also embraces the rents and profits of real estate, in which she has a life interest. But where the wife has a life estate, only in an equitable interest, the husband will be permitted to enjoy it, without her consent, or without making any provision for her, unless he becomes insolvent or fails to maintain her, a duty which the law imposes, when it gives him her property. In such an event, the Court will fasten the obligation of her maintenance upon her equitable property, in his possession, or that of his general assignee, or of a third person, who has acquired it fraudulently. The provision is to be proportioned, not merely to that part of the equitable portion of the wife's estate, which the husband seeks, but to the whole of her personal fortune, including what he has previously received.

5. When will Courts of Equity decree alimony to a married woman?

Alimony is the maintenance or support, which a husband is

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death, survive, and descend to her children; and it has been so held, where there has been only an order by the chancellor, or an agreement for a settlement during the life of the wife. But whether the children, after the death of the mother, have an original equity, independent of her, which will entitle them to a provision out of the equitable assets, before the husband can have the assistance of a Court of Equity, to obtain possession of them, is a question, upon which, the opinions of eminent judges are at variance. The equity of the children has been recognised by some of the English Chancellors, and denied by others. The subject is fully examined by Clancy, and the authorities cited; vide Clancy on Rights, 532. His conclusion is, that it may now be safely asserted to be the law of the Court, that the children have no right to a provision out of their mother's equitable portion, after her death, unless there has been a decree, or an agreement, to that effect, in her life-time, of which, she has not relinquished the benefit. Such is the law of this Court." 5 B. Monroe Rep., 557.

bound to give his wife, upon a separation from her.[1] Although this duty is recognised in a Court of Equity, and although circumstances may give it jurisdiction incidentally, to enforce a separate maintenance, yet it is not, ordinarily, the proper forum to assert that right. It is properly, an incident to the jurisdiction of the Ecclesiastical Courts, to decree a divorce a *mensa et thoro*, or a restitution of conjugal rights. But wherever the wife has any equitable property, within the reach of a Court of Equity, and the husband has deserted, or neglects to provide for her; or whenever there has been a positive agreement between the parties, for a separate maintenance, the Court will interfere, and decree accordingly to the wife.[2] A Court of Equity will never lend its assistance to enforce articles of separation between husband and wife. It merely tolerates such agreements, and in some cases gives effect to their collateral and accessorial provi-

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[1] A demand of alimony, is in the nature of tort, and being personal, dies with the husband; 2 Desau., 206.

[2] "It is," says Chancellor Kent, "a general rule of ecclesiastical law, that pending a suit for a divorce, the Court may, under proper circustances, and in its discretion, allow the wife, by an order on the husband, a sum of money for carrying on the suit, as well as for immediate alimony. In North Carolina, the Courts have no power to assist the wife, in the above cases, *pendente lite*, and Mr. Justice Gaston questions the expediency of granting the power; 2 Dev. & Batt., 377. I am however, entirely convinced, by my own judicial experience, that such a discretion is properly confided to the Courts;" Kent's Com., vol. 2, page 99. The making of a provision for the wife, by a division of the property, is incidental to the power of divorce, and the Court that decrees the divorce, is to make the provision; 1 Black. R., 360; vide also, 4th Dana, 28. In South Carolina, alimony has been decreed to a wife, without a divorce *a mensa et thoro*, where she was forced to leave her husband's house, to avoid a repetition of ill usage, although she had not been beaten or turned away by him. But in such case, the wife must make out very clearly, the good conduct on her part, and bad usage on the part of her husband, amounting to the *sævitia* of the Ecclesiastical Courts. A wife, driven from home, by her husband, is entitled to alimony, until her husband receives her again, and treats her kindly; but a mere offer to receive her back, will not prevent the order, unless, in the opinion of the Court, she may safely return; 2 Desau., 45; 4th Desau., 79, 94, 169, 183.

sions, such as a stipulation for a separate maintenance.[1] The proportion of the husband's estate or income, to be assigned to the wife, for alimony, either pending the litigation, or on final decree for a divorce or separation, is in the discretion of the Court. In fixing the amount, the Court must take into considieration,

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[1] In Lord and Lady St. John, 11 Ves., Jr., this subject was discussed much at large, and though the former cases were not overruled, (the suit having been compromised,) yet after a strong argument, by Sir Samuel Romilly, the Court went fully into the subject, and intimated very clearly an opinion, that such articles of separation are not to be enforced in Equity, except where there are trustees intervening. Lord Eldon, following the suggestions of the counsel, took the case up upon principle; declared it to be the great principle of the English law, that the contract of marriage should, to a certain extent, be indissoluble even by the sentence of the law, with the design that after that sacred contract, the parties should feel it to be their mutual interest to improve their tempers. He states the known law to be, that there shall be no separation, *a mensa et thoro*, except *propter sævitiam aut adulterium*; and this, for the sake of keeping together individual families, constituting the great family of the public. He declares that the Ecclesiastical Courts, would not read such deeds of separation, but unless there has been, *sævitia aut adulterium*, would not only refuse to enforce separation, but would oblige the parties, by sentence, to reside together. He takes up the question, as one involving the important enquiry, whether parties or their trustees can covenant that they shall, by contract, bind themselves to do what the policy of the law, declares shall not be done, and whether, by any agreement of theirs, they can divest themselves of the sacred duties of a parent, and the other obligations arising from the marriage contract. He suggests also, the farther difficulty arising from the deed of separation, not binding the wife at any rate, and it's therefore, being impossible to enforce it against the husband, because if binding at all, it must be mutually so. Afterwards, in Worall *vs.* Jacobs, Sir William Grant said, he apprehended it to be settled, that Chancery would not carry into execution, articles of agreement, between husband and wife. The Court did not recognise any power in the married parties to vary the rights and duties, growing out of the marriage contract, or to affect, at their pleasure, a partial dissolution of the contract. But he admitted, that engagements between the husband and a third person, as a trustee for instance, though originating out of, and relating to, a separation, were valid, and might be enforced in Equity. It was indeed, strange, that such an auxiliary agreement should be enforced, while the principal agreement between the husband and wife, to separate, and settle a maintenance on her, should be deemed to be con-

the nature and amount of the husband's means, the claims of his children, and others, upon him, for sustenance and education, and his ability to support himself by his own exertions.[1]

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trary to the spirit and the policy of the law. If the question was *res integra*, said Lord Eldon, untouched by dictum, or decision, he would not have permitted such a covenant, to be the foundation of a suit in Equity. But dicta have followed dicta, and decision has followed decision, to the extent of settling the law on this point, too plainly, to be now disturbed in Chancery; vide Tucker's Com., vol. 1, page 107; Kent's Com., vol. 2, page 176.

[1] 3rd Paige, 267; 6 J. C. R., 91; see also, 4 Hen. & Munf., 507.

CHAPTER XXXVIII.

SET OFF.

1. EQUITABLE JURISDICTION IN CASES OF SET OFF.

1. What is the nature and extent of the jurisdiction of Equity, in cases of set off?

The doctrine of set off, has been borrowed to a limited extent, from the civil law doctrine of compensation.[1] Independent of any statuteable regulations, the mere existence of distinct debts, without mutual credits, or some supervening Equity, has

[1] The right of set off, does not attach to the debt itself, nor depend upon the mutuality of the debts, in their origin, as an inherent quality belonging to such debts, but upon the situation and rights of the parties between whom it is sought to be enforced. It is a privilege, or right, attaching to the remedy only; and which, by the laws of some of the States, may be allowed, while in others, it is denied. But it touches not any obligation of contract or vested right. The right of set off, is not an equity which the original debtor may, at all events, assert against the assignor or assignee of the debt, whether he has, or has not, notice of its existence. The Court of Chancery has, as yet, laid down no such general rule, as that an Equity exists, to have debts set off against each other, which attaches to the debts themselves, and travels with them into whosoever's hands they may come; though it is doubtless true, that where there are mutual subsisting debts, and either an express or implied agreement of stoppage, pro tanto, or mutual credit, a Court of Equity will enforce it against the party himself, and against his assignee with notice." 5 Mason, 202; 1 Edw. Ch. R., 402; 2 Edw., 73.

never been supposed to give the right of set off, in a Court of Chancery. The general principle has always prevailed, both at law and in equity, that where there were connected accounts of debt and credit, the balance of the accounts constituted the amount due, and was the sum only recoverable. By statute, however, both in England, and in most of the States in our own country, the rights of set off has been greatly extended. Courts of Equity have, since that time, generally followed the course adopted in the construction of the statutes, by Courts of Law;[1] and have applied the doctrine to equitable debts; but they have rarely broken in upon the decisions at law, unless some other equity intervened, which justified them in granting extraordinary relief.[2] Such an equity does arise, where there are mutu-

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[1] Although a Court of law declines to determine a question of set off, yet this is not *res judicata*, so as to preclude an enquiry in a Court of Equity, having concurrent jurisdiction; 2nd Edw., 73.

[2] The doctrine laid down by Judge Story, in the text, and sustained by a reference to English and American decisions, and among others, to 2nd Sumn., 409, 628, that Courts of Equity will not admit a set off, founded upon the mere fact of insolvency, has been frequently controverted in this country. Indeed, Judge Story, himself, in Howe et al *vs.* Shepard, 2nd Sumn., 414, says, "that natural Equity, would seem persuasively, to urge such a set off; for otherwise, the insolvent party might recover his whole debt, and the other party might recover a dividend only, or indeed, nothing. But after no inconsiderable search, I have been unable to find in English jurisprudence, a single decision which countenances any such Equity, for a set off."

In the case of Lindsay *vs.* Jackson, 2nd Paige's R., 581, Chancellor Walworth arrives at a different conclusion. "Where," says he, "there are mutual demands between the parties, which cannot be set off, under the statute, but which, a Court of Equity may compensate or apply, in satisfaction of each other, without interfering with the equitable rights of any other person, the fact, that one of the parties is insolvent, has frequently been held a sufficient ground for the exercise of the equitable jurisdiction of the Court of Chancery; vide 1 P. Wms., 325. In Pond *vs.* Smith, 4 Conn. R., 302, the Supreme Court of Connecticut, held, that the insolvency of one of the parties, was a sufficient ground for the interference of a Court of Chancery, to set off mere legal demands against each other, although they were so situated to be incapable of being set off at law; and that the complainant ought not to be left to pursue his legal remedy against the defendants, when from their

al credits between the parties; or where there is an existing debt on one side, which constitutes the ground of credit on the other; or where there is an express or implied understanding that the mutual debts shall be a satisfaction, or set off *pro tanto* between the parties. So, under special circumstances, they will depart from the rule of law which does not allow a set-off of debts accruing in different rights. Thus, if one joint debtor is only a surety for the other, he may in Equity, set off the separate debt due to his principal from the creditor; for in such a case, the joint debt is nothing more than a security for the separate debt of the principal; and upon equitable considerations, a creditor who has a joint security for a separate debt cannot resort to that security, without allowing what he has received on the separate account, for which the other was a security. And it has been laid down generally, that wherever the Court finds a case of natural Equity, not within the statute, it will permit an equitable set off, if from the nature of the claim, or

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insolvency, no satisfaction of his demand could be thus obtained. And in Searchet *vs.* the Adm. of Searchet, 2 Ohio R., 320, the Supreme Court of Ohio, on a bill in Equity, permitted the complainants to off set an equitable balance, due to them, from their co-partners, against a joint bond, given by them to him; although from the unliquidated nature of their claim, there could be no set off at law. In Collins *vs.* Farquar, 1 Little R., 153, the Court of Appeals in Kentucky, recognised the principle that the insolvency of the defendant, will, in Equity, give the Court jurisdiction to decree a set off, of a demand against him, which might be recovered in an action at law, if he was solvent. And the same principle is subsequently affirmed, 1 Monroe R., 194; 4 Bibb's R., 356; also 8th Dana, 164. And in the case of Simpson *vs.* Hart, 14 J. R., 63, a set off was allowed in a case where it was evident no set off could be pleaded at law, and Judge Spencer, in delivering the opinion of the Court of Errors, considers the fact of the insolvency of the defendant, a material allegation in the cause, and puts the decision substantially on that ground." It was held, in the same cases, that a set off might be allowed on the application of the complainant, where the defendant is insolvent, although his debt is not due. But the rule is otherwise, if the debts of the defendant to the complainant is payable at a future day.

from the situation of the parties, or by reason of the fraud of one of them, it is impossible to obtain justice in a cross action.[1]

[1] There are some miscellaneous points connected with the equitable jurisdiction over set off, worthy of note.

1. The power of a Court of Chancery to off-set one judgment or decree against another, on *motion*, is the same as that of the common law Courts. But on a bill filed for an off-set, the jurisdiction of the Court of Chancery is more extensive than that of the common law Courts. A Court of common law allows a set-off of judgments, *ex gratia*, but in Equity it is matter of right. This power does not depend upon the statutes of set off, but upon the general jurisdiction of the Court over its suitors. And it is an Equitable jurisdiction. 1 Paige, 622; 14 J. R., 63.

2. An executor or administrator cannot, either at law or in Equity, set off a demand purchased by him after the death of the testator or intestate, against a debt due by the estate to the person against whom he holds the demand so purchased. For it is against the principles of sound policy to permit executors to purchase up claims against the creditors of the estate of the testator, for the purpose of obtaining a set off in Equity. 2nd Paige, 402.

3. An unliquidated account cannot be set off in Equity, but the Court will sometimes defer a decree, to have an account liquidated. 11th Verm., 96.

CHAPTER XXXIX.

ESTABLISHING WILLS.

I. JURISDICTION OF EQUITY IN ESTABLISHING WILLS.

1. What is the extent of the jurisdiction exercised by Courts of Equity, in establishing last wills and testaments?

Courts of Equity have complete and original jurisdiction, to establish a will which has been destroyed, or to compel its production, when fraudulently suppressed, and they may proceed to try the cause without an issue, unless the conscience of the chancellor requires the aid of the verdict of a jury.[1] But they have no direct authority to determine the validity of a will, on the allegation that it has been fraudulently procured; but, if the will is of personal estate, must refer the question to the decision of the Ecclesiastical tribunals,[2] and if it is of real estate, either

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[1] In Kentucky, where the contents of a last will may be established in the ordinary Court of Probate, it has been held, that a Court of Equity should not entertain jurisdiction to establish a will merely in consequence of its loss. There must be proof of spoliation, suppression, or other fraud, or the necessity of a discovery, in all of which cases a Court of Equity may exercise more effectual power than a County Court. 3rd B. Munroe, 243.

[2] There is a difference between devises of realty, and bequests of personalty. The former come within the cognisance of Chancery; but in the necessary investigation, the propriety of a trial by jury, is so evi-

direct an issue of *devisavit vel non* to be tried, or an action of ejectment to be brought at law. Unless there is some impediment to proceeding at law, the heir or devisee of real estate cannot resort to Equity, but must bring ejectment, as the jurisdiction of that Court is only incidentally exercised, as when a trust is to be executed, assets marshalled, &c. When a Court of Equity has been fully satisfied of the validity of a will, by the verdict of a jury, on one or more trials, it will act on the maxim, *interest reipublicæ ut sit finis litium*, and grant a perpetual injunction to any future litigation; and to insure a full and fair investigation at law, they have established as a general rule, that all the witnesses to a will must be examined.

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dent, that it is now the settled duty of the Court, and the right of the parties that such a trial should take place. But the decision of the Ecclesiastical Courts, is, in England conclusive upon the latter, and cannot be impeached in Chancery, either with or without a jury; a will of real and personal estate, may, therefore, be adjudged both valid and void by different tribunals. Fonblanque's Equity, by Laussert, Vol. 1, 32.

In the case of Tompkins *vs.* Tompkin's, 1 Story's C. C. R., 547, Judge Story thus draws the line of distinction: "The validity of the wills of real estate is solely cognisable by courts of common law, in the ordinary forms of suit; and the verdict of the jury in such suits, and the judgment thereon, are by the very theory of the law, conclusive only, as between the parties to the suit and their privies. But it is far otherwise in cases of personal estate. The sentence or decree of the proper Ecclesiastical Court, as to the personal estate, is not only evidence, but is conclusive as to the validity or invalidity of the will, so that the same question cannot be re-examined or litigated in any other tribunal. The reason is that being the sentence or decree of a court of competent jurisdiction upon the very subject matter in controversy, to which all persons who have any interest, are, or may make themselves parties, for the purpose of contesting the validity of the will; it necessarily follows that it is conclusive between those parties. For otherwise there might be conflicting adjudications upon the same subject matter between the same parties: and thus the subject matter be delivered over to interminable doubts; and the general rules of law, as to the effect of *res judicata* completely overthrown." Vide also 4th Cranch., 434; 9 Cranch., 126; 3rd Wheat., 246; 12th Wheat., 169; 1 Peters, 338; 2 Peters, 157; 2nd How., 619.

CHAPTER XL.

AWARDS.

1. EQUITABLE JURISDICTION OVER AWARDS.

1. What are the limits of the jurisdiction over awards, in Equity?

A Court of Equity will not decree the specific performance of an agreement, to refer a matter in controversy to arbitration,[1]

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[1] The Court of Chancery will not decree the performance of an award, unless on consideration of a subsequent agreement to perform it. 4 Harr. & McHen., 43. But in McNiel *vs.* Magee, 5 Mason, 244, it was held, that Courts of Equity have jurisdiction to enforce the specific performance of an award respecting real estate.

So in Smallwood *vs.* Mercer, 1 Wash., 290, it was held, that in cases of bonds to perform awards, there are two remedies; 1st. At law upon the bond, in which a plea that the arbitrators made no award, would if true, defeat the plaintiff's action. 2. If any act be awarded to be done, for which a complete remedy cannot be had at law, (such as to make a conveyance,) a bill in Equity for a specific performance of the award, is common and proper. But the Court cannot decree specific performance, where no award has been or can be made.

A bill in Equity to enforce the specific performance of an award, rests upon this clear ground—the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; it is therefore only the specific performance of an agreement, which such a bill calls for. 1 Swans., 54.

deeming it contrary to public policy, to compel parties to resort to a tribunal, which from its inability to examine them on oath, or to require the production of papers, possesses so limited a capacity to administer justice. Where an unimpeachable award has been rendered, it will constitute a bar to any farther litigation, as well in Equity, as at law; and in a proper case, Courts of Equity will lend their assistance to enforce it. Awards form no exception to the principles upon which the general jurisdiction of Equity is exercised, in cases of fraud, accident or mistake; and an award will be set aside, which is proved by satisfactory evidence to have been obtained by fraud, or in which the arbitrators have committed a mistake that ought to be remedied. An arbitrator, says Mr. Jeremy, is regarded as a judge chosen by the parties, from whom there is no appeal, and his authority is more absolute and discretionary, than that which can be exerted in courts of law or equity; for whilst they are restrained by former precedents, and influenced by the consideration that their decision is to form a new rule of action in similar cases, his attention is confined to the individual matter before him. He may, therefore, in some instances relieve against a harsh right, which in a court of justice upon the ground of public policy would prevail. And if acting properly himself, and not unduly influenced by either of the parties, he decides erroneously on a general reference to him, which involves both questions of law and fact, his judgment cannot be impeached; and this is even true on a question of law, if the parties have submitted the same purposely to him. If, however, he intended to decide according to law, and has made a mistake,[1] or if legal rights be referred to

[1] This subject is examined by Mr. Justice Story, in the case of Klein *vs.* Catara, 2 Gallis, 70. He says, "where the referees specially state the principles on which they have acted in making an award, they are presumed to intend referring their decision to the Court to be reviewed, and if in such a case, they have acted under a mistake as to the law, the Court will set aside the award, for it is not that which the referees meant to make. If in the case before the Court, the referees had made a general award, without any specification of the reasons of their decision, it would have deserved very grave consideration, whether we could by collateral evidence, have examined into the existence of any errors of law. We are not prepared to say that such a course would be proper, unless the submission were restrained to that effect, or misbehaviour

him, and he has exceeded his power in giving his decision upon a point of law, and that determination should be wrong, the Court will interfere.

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were justly imputed to the referees. But here the referees have expressly laid the grounds of their decision before us, and have thereby submitted it for our consideration. This course is not to be commended. Arbitrators may act with perfect Equity between the parties, and yet may not always give good reasons for their decisions; and a disclosure of their reasons may often enable a party to take advantage of a slight mistake of law which may have very little bearing on the merits. A special award, therefore, is very perilous; for when it is once before the Court, it must stand or fall by its intrinsic correctness, tested by legal principles.

CHAPTER XLI.

WRIT OF NE EXEAT REGNO, AND PROCEEDINGS ON ISSUES.

1. NATURE AND APPLICATION OF THE WRIT OF NE EXEAT REGNO.
2. PROCEEDINGS UPON ISSUES.

1. What is the writ of ne exeat regno, and when is it granted by Courts of Equity?[1]

The writ of ne exeat regno, is, in England, a prerogative writ, which was originally applied, only to great political objects and purposes of state. It is in use in America, as a writ of right, and is in the nature of equitable bail. It is a proceeding in Equity, to obtain bail, where there is a debt recoverable in Equity, but not at law.[2] Its object is, to hold the party person-

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[1] 1 J. C. R., 1, 264; 3 J. C. R., 75, 412; 6 Rand., 188; 1 Paige, 606; 4th Paige, 264; 5 Harr. & J., 384; 5 Gill & John., 463; Hopkins, 496; and Barbour's Chancery Practice, vol. 1, page 647.

[2] In the case of Porter *vs.* Spencer, 2nd J. C. R., 169, Chancellor Kent held, that where a defendant, who had been sued at law, and held to bail, in a case not of Equity jurisdiction, was about to depart from the State, with his bail, who had sold his property, the Court, from the necessity of the case, and to prevent a failure of justice, would grant the writ. "I should think," says he, "it would reflect discredit on the administration of justice, if the plaintiff could find no relief from the impending mischief, arising from a failure of the remedy at law, by a re-

ally, within the jurisdiction of the Court, to answer any order or decree made by the Court, and the writ is proper, simply for the purpose of detaining the person of the defendant, to respond to the decree of the Court.[1] The Court will only issue it, says Lord Eldon, in Turner & Russ., 332, 1. when the debt is equitable; 2. when it is actually due, and 3. when the claim is so certain in its nature, that the Court can see its way to direct what sum shall be marked upon the writ.[2] There is one appa-

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moval of the defendant and his bail." Mr. Hoffman, in vol. 1, page 92, of his Chancery Practice, reviews this decision, and the English authorities, bearing upon the same point, and maintains that they are inconsistent with each other. His conclusion is, that the writ can only issue where the Court has jurisdiction of the matter, and is called upon in a bill, to determine that matter, whether redress could be had at law or not; and this, with the single exception of alimony, pending suit is a universal rule. It would appear very singular and novel, if the writ can issue, merely as an auxiliary of an action at law, without the least equitable right, which would sustain a bill, without seeking, or being able to seek, any relief in Equity, and where the only object is the detention of the defendant, the better to secure the recovery of a legal demand. It would form a new era in the history of the process. If even the case is strictly confined, as an authority, to a fraudulent combination, between the defendant and his bail, to abscond, the answer of Lord Rosslyn may be given, "that it is too general a ground to take, for supporting this writ, or any other proceeding in this Court, that it will act generally, to prevent injustice."

[1] The act to abolish imprisonment for debt, has not deprived this Court, of the power to issue a writ of ne exeat, in cases of equitable cognisance, where such writ would have been allowed, previous to the passage of that act. But such writ will not be granted upon a mere legal demand, upon which the complainant would have been entitled, to equitable bail in this Court, before the passing of that act; although the defendant is about to remove from the State; 5th Paige's R., 235. If the party, against whom, a final decree is made, intends to remove beyond the jurisdiction, before the decree can be enforced by execution, a ne exeat will be granted; 1 Paige's R., 629.

[2] The complainant is not entitled to a writ of ne exeat, on a bill for the specific performance of a contract, previous to the time at which the contract is to be performed, and before any right of action has occurred thereon, either at law or in equity, against the defendant. The complainant must show a debt actually due, and to this end, must show affir-

rent exception to the rule, that the debt must be equitable, the case of account, where there is an admitted balance due, by the defendant, to the plaintiff, but a larger sum is claimed by the latter; and in this case, there is no real deviation from the rules of equitable jurisdiction, as matters of account, are properly cognisable in that Court. Another exception, and one not so easily reconcileable with the general rule, is, where alimony has been decreed to a wife, and her husband is about to leave the realm; in which case this writ will lie. Courts of Equity observe great caution in issuing this writ, as it is a strong step, tending to abridge the liberty of the citizen. The Court is only justified in issuing it, where a bill has been filed, stating the proper facts on which the discretion of the Court is to be exercised, and where there is an affidavit, verifying those facts.[1]

2. When do Courts of Equity refer the decision of a question of fact or law, to the Common Law Courts?[2]

It frequently happens, in the course of a proceeding in Equity, that the Court is called upon to decide a question of law, which it feels incompetent to determine, or is embarrassed in the solution of a question of fact, by the defects incident to all written testimony.[3] It is usual, under these circumstances, to sub-

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matively, that he is able to make a good title to the premises, agreed to be sold; 5th Paige's R., 235.

[1] A writ of ne exeat may issue against a foreigner, or citizen of another State, on demands arising abroad; 3rd J. C. R., 412; 2nd Paige, 606; Hopkins, 496.

[2] The student will find a very full and instructive account of this subject, in Barbour's Chancery Practice, vol. 1, page 446.

[3] When facts are to be decided, which, from their nature, demand publicity, for their trial, (as a question, whether a party is the heir at law of an intestate;) or where some one interested, has a peculiar right to the fullest investigation possible, (as an heir, who is questioning a will;) or where the judge really feels a difficulty too great to be removed, by the mere substitution of the master's opinion, for his own, as in the case of deaths at sea, or where he thinks it better that the responsibility and unpopularity of deciding, should be thrown from himself, upon that evanescent tribunal, a jury;—in these, and other cases, the Court of Equity calls in aid the common law tribunal, to declare its opinion on a

mit the former question to the consideration of the Judges of the Courts of Law, and to request their opinion, and to direct, either a trial at law, or an issue for the determination of the latter. In the case of an issue upon a point of law, it is brought before the common law judges, on a demurrer, and if speed is required, a *consilium* is obtained for that purpose. If the question is one of fact, it will sometimes order a regular action to be brought at law; or it will direct a master to frame an issue, involving the question between the parties, and then require them to proceed at law, as for a wager, the plaintiff in Equity, being the plaintiff at law, and averring in his declaration, that a wager has been laid on the truth of the statement in the issue, and the defendant admitting the fact. As this proceeding takes place for the purpose of "informing the conscience of the Court," it is not strictly bound down to the forms and incidents of a regular trial. Sometimes it insists on more than the common law tribunal would have been satisfied with; as on the issue *devisavit vel non*, where the examination of all the three witnesses to the will, is indispensable. Sometimes, it is satisfied with less, and directs the examination of the parties themselves, and also the reading of the depositions, which may have been previously taken. When the verdict is returned, the Equity Judge does not look barely at the wording of it, as he would, if a verdict on a former trial were produced in evidence, but he inquires into all that passed during the proceedings, and may, if he thinks fit,

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matter of fact. Some issues have, of late years, been granted almost of course, as an issue to try the validity of a modus, or an issue devisavit vel non. So, when the answer stands opposed to the evidence of a single witness, aided by circumstances, sufficient to give weight, the defendant may almost claim an issue, as of right. Vide Gresley on Equity Evidence, from which we have borrowed a portion of the matter in the text.

It is the practice, and the undoubted jurisdiction, of a Court of Equity, to decide on the facts, as well as the law; and the awarding of an issue, rests in sound discretion. It would be an abuse of that discretion, and the creation of a great and unnecessary expense, to award an issue, when the truth of the fact could be sufficiently and satisfactorily ascertained, by the Court itself; 6 J. C. R., 257; 1 J. Cas., 436; 3rd Paige, 453; 1 Henn. & Munf., 372; 1 Bland., 485.

treat the verdict as a mere nullity. The standard being so vague, as the satisfaction of the conscience of the individual judge, who has directed the issue, the rules for granting a new trial are extremely indefinite. When, however, the Court sends the question back to law, it will be, usually, to another tribunal.[1]

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[1] There is another interlocutory proceeding, which from its constant recurrence requires some description, in the reference to a master, when the Court feels a difficulty or inability to afford relief without the attainment of some preliminary information.

The masters are subservient to the Court in a great variety of instances, but the nature and extent of their office will be sufficiently apparent from the statement, that references are made to them to take accounts which may be necessary in the progress of a cause, and frequently to investigate the claims of persons upon the property in suit, and in due time to satisfy such as may be admitted; to examine the title to estates, and to settle conveyances; to make sale of property, and to enquire into the propriety of granting leases, felling timber, or making repairs; and to appoint new trustees of property, guardians of infants, and committees of idiots and lunatics. And for the purpose of facilitating enquiries which it may be thought expedient thus to refer, and of rendering them more effectual, the masters may be empowered to examine witnesses, or even parties to the cause, upon interrogatories. This extra-judicial mode of investigation is of very great advantage, not only as the means of relieving the Court itself from the performance of burthensome, and sometimes inconsistent, duties which are nevertheless necessary to the administration of justice, but as the means of enabling it to extend the benefits of its jurisdiction to a much greater variety of cases. And upon the master's reports, where a reference has been thought necessary, if the conscience of the Court be satisfied, it will make its final decree. Jeremy's Equity, page 293.

CHAPTER XLII.

BILLS OF DISCOVERY, BILLS TO PERPETUATE EVIDENCE, AND TO TAKE TESTIMONY DE BENE ESSE.

1. NATURE OF BILLS OF DISCOVERY.
2. BILLS TO PERPETUATE EVIDENCE.
3. BILLS TO TAKE TESTIMONY DE BENE ESSE.

1. What is a bill of discovery, and when does it lie?

Every bill in Equity is in a general sense, a bill of discovery, since it seeks to obtain a disclosure from the defendant, on oath, of the facts propounded in the bill. But the term is peculiarly and properly applied to a bill for the discovery of facts, resting in the knowledge of the defendant, or of deeds, or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery, although it may pray for the temporary stay of proceedings at law. The bill is commonly used to obtain a discovery of facts material to the prosecution or defence of a suit, which either has been brought or is about to be brought at law: and it is not necessary to aver that the plaintiff has no other evidence by which to establish his claim or defence.[1] The plaintiff must show that he has an interest in the subject matter, to which the required discovery relates, and that

[1] 9th Paige's Rep., 580.

the discovery is material to the prosecution or defence of his rights. It is a good objection to a discovery, that the defendant may be examined as a witness, except in a case where it is sought from the book-keeper or other officer of a corporation; or, that the defendant is a *bona fide* purchaser for a valuable consideration without notice; or, that it would subject him to a penalty or forfeiture.[1]

2. What is a bill to perpetuate testimony, and when will Courts of Equity take jurisdiction of it?

The object of this bill is to preserve testimony in *memoriam rei*, which is in danger of being lost, before it can be made the subject of judicial investigation. This jurisdiction is only entertained, where it is absolutely necessary to prevent a failure of justice; both, because it leads to a trial on written depositions, which is much less favorable to the cause of truth, than *viva voce* examination of witnesses, and because the witnesses testify without any apprehension of punishment for perjury, as the depositions cannot be published till their death. The plaintiff must, therefore, aver in his bill, that the matter in question cannot be made the subject of immediate judicial investigation. The right to maintain this bill, exists in reference to every species of vested interest, however minute the amount or remote the prospect of possession, and whether it be real or personal, in its character. But the interest must not be contingent, however proximate and valuable. Thus, the next of kin, of a lunatic, cannot support a bill to perpetuate testimony with respect to the lunatic's affairs, however desperate his case may be; for

[1] It was formerly said that if a discovery might tend to render a party infamous, he should not be obliged to answer; but it has been held by Lord Eldon, that if a defendant be not liable to any penalty or forfeiture, he is bound to answer fully, notwithstanding his answer may tend to cast a very great degree of reflection upon his character and conduct. Hare on Discovery, 132. If the plaintiff is solely entitled to take advantage of the penalty or forfeiture, and waives his right in the bill, the objection to the discovery will be obviated. Nor does the objection apply, where the liability of the defendant is of the nature of stipulated damages. But the defendant will be protected from answering, not only where the question has a direct tendency to criminate him, but where it forms a single step towards it. Hare on Discovery, 137, 138, 152.

the law always recognises the possibility at least, of his recovery; upon which, restitution of his property is to be made, and an account rendered to himself alone.

3. What is the nature of a bill to take testimony, de *bene esse?*

It is a bill filed, during the pendency of a suit at law, to take the testimony of witnesses, whose presence there is reason to apprehend, cannot be procured on the trial. It will be granted, of course, to take the testimony of a witness living out of the jurisdiction of the Court, where the evidence sought, is material. But, as the Court cannot confer upon its commissioners, any authority in a foreign country, the success of the proceeding must depend entirely on the determination of the witnesses, whether they will be examined or not. So, where a witness is sick or aged, and therefore, in danger of dying before the cause is tried, or where the proof of a material fact in the case depends upon so frail a tenure, as the life of a single witness, such a bill will be entertained.

CHAPTER XLIII.

PECULIAR DEFENCES AND PROOFS IN EQUITY.

1. DEFENCE OF THE STATUTE OF LIMITATIONS.
2. PLEA OF THE STATUTE OF FRAUDS.
3. PLEA OF AN ACCOUNT STATED.
4. BONA FIDE PURCHASER FOR A VALUABLE CONSIDERATION.
5. EFFECT OF THE WANT OF PROPER PARTIES TO A BILL.
6. PECULIAR RULES AND PRINCIPLES OF EVIDENCE IN EQUITY.
7. NATURE AND INCIDENTS OF A DECREE.

1. When does the Statute of Limitations, constitute a good defence in Equity.[1]

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[1] There are some other points, connected with the Statute of Limitations, which should be noted in this place.

1. *Its operation in reference to trusts.* "The general rule, that no lapse of time, will bar a direct trust, as between a trustee, and cestui que trust, is broadly laid down in many cases. Direct trusts are such as are created and acknowledged by the act of the parties; possible or eventual trusts occur where a party, who took possession, originally, in his own right, and was prima facie, the owner, is afterwards converted into a trustee by evidence. In these latter, it was never doubted, that length of possession was, and ought, to be a bar, on the principle of the Statute of Limitations. In the case of Kane *vs.* Bloodgood, 7 J. C. R., 110, the subject was elaborately investigated by Chancellor Kent; and the bar of the Statute of Limitations upon trusts, was still further extended, and more accurately described, than in any previous cases. Ac-

Courts of Equity, as we have before seen, refuse their assistance to a plaintiff, who sets up a stale demand, or who has, for

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cording to that decision, the word 'trust,' is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money, to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and sueable, either in law or equity. The several contracts of bailment, which, according to Sir William Jones, "are among the principal springs, and wheels of civil society"—are cases of express and direct trusts. All of these examples are not to be taken out of the Statute of Limitations, under the notion of a trust, when one of the parties, selects his remedy in Equity. It is not true, therefore, as a general proposition, that all cases of direct and express trust, between trustee and cestui que trust, are to be withdrawn from the operation of the statute, notwithstanding a clear and distinct remedy, exists at law. The sound rule established on the solid foundations of authority, and policy, is, that the trusts not to be reached, or affected, in Equity, by the Statute of Limitations, are those technical and continuing trusts, which are not at all cognisable at law, but fall within the proper, peculiar, and exclusive jurisdiction of Chancery."

The restriction established, in Kane *vs.* Bloodgood, of the ordinary rule, must be considered, as the natural conclusion of a discriminating, and profoundly learned jurist, who had bent all the energies of his mind, to the perfect understanding of the subject before him. It possesses, also, an advantage, in its greater accordance with modern opinions on the general subject of limitations. It seems, therefore, that to exempt a case of trust from the bar of the Statute, it must be 1st, a direct trust; 2nd, it must be of the kind, belonging exclusively, to the jurisdiction of Equity; and 3rd, the question must arise between trustee and cestui que trust. "Lansat's Edition of Fonblanque's Equity, note 246, with references there mentioned. There is an interesting and elaborate review of the opinion of Chancellor Kent, in this case, to be found in the American Jurist, vol. 1, 349, N. S.; see also, 4th Black., 80; 5th Dana, 199; 2 B. Monroe, 438; 1 Green's Chy., 209; 8th Porter, 211; 1 J. J. Marshall, 370, 401; 2 Desau., 238.

2. *In the case of legacies.* There is no legal bar, by force of the Statute of Limitations, to a legacy; but Equity, justly averse to stale demands, adopts the provisions of the statute, as a guide in the exercise of its discretion; and therefore, a lapse of thirty years, affords a presumption of payment. The rule, as to a legacy, has sometimes been said to rest on the ground of a trust, and sometimes, on the impossibility of settling, when the statute shall run, as the legacy is only payable, when the executor shall have possessed assets, sufficient for the discharge of

an unreasonable time, slept upon his rights, whether the law fixes a limitation or not. The Court, in such cases, is governed by circumstances. It has no legislative power, whereby to define the time of bar, positively, to an hour, a minute, or a year. Where, however, the proper authority has limited the time of actions, and remedies, to a certain period, in legal proceedings, the Court of Chancery has adopted that rule, and applied it to similar cases in its own forum. Wherever, therefore, the jurisdiction of the Courts is concurrent, or the equitable title relied upon, similar in its nature, to a legal title, which would be barred, Courts of Equity follow the analogy of the law, and adopt the Statute of Limitations.[1]

2. When will a plea of the Statute of Frauds constitute a good bar to a suit in Equity?

Wherever a bill is filed for the specific performance of a parol agreement respecting lands, the defendant may either deny or admit the parol contract, and yet protect himself by insisting upon the benefit of the Statute of Frauds. But where the de-

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the debts and legacies, which may be at an indefinite time; 7 J. C. R., 126. But, though the exemption of legacies, from the statute, is the established rule in England, where it is the proper and exclusive province of Equity, to enforce this payment; the case of Kane *vs.* Bloodgood, 7 J. C. R., 126, overruling 3 J. C. R., 222, casts great doubt upon its applicability, in such of our states, as have given a remedy at law, for the same purpose; vide 10th Yerg., 94.

3. *In case of dower.* It has been held, in some of the states, that the Statute of Limitations, does not apply to a suit for dower; 4 N. H. R., 107; 6th J. C., 194. But these adjudications, seem to have grown out of the peculiar phraseology of their laws. The petition for dower, being, in Ohio, substantially, a possessory action, for the recovery of a private right, is embraced within the provisions of the Statute of Limitations; 10th Ohio, 24; vide also, 3rd Desau., 555.

4. Lapse of time in Equity, is permitted, to defeat an acknowledged right, on the ground, only, of its affording evidence that such right has been abandoned. It can never, therefore, prevail, when such presumption is outweighed, by opposing facts, or circumstances; 4 Munf., 332.

[1] 3rd Peters, 470; 6 Peters, 61; 9th Peters, 62, 406; 10th Peters, 177; 1 McLean, 17, 86; 1 Bald., 392; 2nd Gill & J., 307; 1 Edw., 343; 5 Mason, 143; 4 Yerg., 104; 3 A. K. Mars., 544; 10th Ohio, 524; 7th Paige's R., 195.

fendant admits the agreement, and does not rely upon the Statute,[1] the Court will presume that he intends to waive it, and if the case is a proper one, will decree a specific performance So, the statute may be pleaded to a bill for the discovery and execution of a trust, with an averment that there was no declaration of the trust in writing; although the operations of this defence may be controlled by circumstances of fraud.

3. When is the plea of an account stated, a sufficient defence in Equity?

This subject has been previously considered to some extent. Courts of Equity are not disposed to favor these short hand bars, as they have been not inappropriately called; but ordinarily, where a balance has been struck and admitted in writing, they will preclude further investigation, unless some equitable circumstances supervene.

4. When does the plea of a bona fide purchaser for a valuable consideration, without notice, furnish a good defence in Equity?

A Court of Equity, as we have already seen, will lend no assistance to a plaintiff, when the defendant has an equal claim upon its protection.[2] This, however, is only the case where the defendant has not only purchased, but actually paid the consideration money, without notice of the plaintiff's title. Where only a part of the purchase money has been paid, he is entitled to protection, *pro tanto*. And this protection of the first purchaser, will enure to the benefit of a sub-vendee, who is affected with notice. It applies not only to bills for relief, but to bills of discovery. Equity will not, indeed, take the first step against such a purchaser, but will allow him to use every advantage which the law gives him.[3]

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[1] 11th Ohio, 455.

[2] If a person rests his claim in Equity on the fact of being a bona fide purchaser, he must deny notice, fully, positively, and precisely, even though it is not charged on the other side; and he must also deny all knowledge of the facts charged from which notice may be inferred. 8th Cowen, R., 361; 3rd J. C. R., 345; 3rd Yerg. 508; 1 Hopk., 48.

[3] 1 Sumn., 507; 5 Mason, 269; 7 Cranch., 2; 7th Peters, 252; 10th Peters, 177.

5. What is the effect of an omission to make proper parties to a bill in Equity ?

Courts of law can only adjudicate between persons having a direct and immediate legal interest, in the subject of the suit. The forms of proceeding through which the jurisdiction of that Court must be exercised, do not embrace remote, contingent, or equitable interests. The remedial functions of the chancellor's being much more extensive, it became their fixed policy, on taking jurisdiction of a cause, not only to settle the controversy between the immediate parties, but to prevent a multiplicity of suits, and to put an end to all future litigations, by rendering a decree which should bind all persons, having any interest in the object of the suit. Equity delights, it has been said, to do justice fully, and not by halves. As, however, it is a fundamental principle of justice, that no man should be excluded from the assertion of a right, which he has had no opportunity to defend, the Courts of Chancery very early adopted the rule of requiring, whenever it was practicable, that all persons, however numerous, having either a legal or beneficial interest in the subject matter, and result of a suit, should be made parties. It is, however, a question, in many cases, of no inconsiderable difficulty, and depending upon the decision of the Court in the particular case, to determine what persons possess that interest, which renders them necessary parties. The student will find the principles applicable to each class of cases, discussed in the various treatises in Equity Pleading.

6. How do the rules of evidence, which have been adopted in Courts of Equity, differ from those which prevail in Courts of Law ?

The maxim, *æquitas sequitur legem*, is emphatically applicable to the subject of evidence. The whole system of evidence in Courts of Equity, consists of the rules, established by the English lawyers, engrafted upon the forms used by the civilians. The modifications which those rules have received in Courts of Equity, may be mainly referred to their different forms of proceeding. The competency of witnesses, the materiality and relevancy of testimony, the nature and extent of proof required, the effect to be given to certain evidence, are subjects governed by the same general principles, in Equity, as at law. The col-

lection of testimony in written depositions, the introduction of the parties themselves as witnesses, *sub modo*, and the liberty under certain equitable circumstances of rebutting artificial presumptions of law, which would work injustice, constitute the leading distinction between the two systems. First; Courts of Equity require all testimony to be taken in the form of written depositions, and only allow *viva voce* examination in a few special cases, such as proving a deed or voucher, referred to in the papers, at the hearing.[1] Second; in Courts of Equity, the par-

[1] In ancient times, the examination in Chancery, was in open Court before the Master of the Rolls,—in the Exchequer, before one of the Barons; and therefore it should seem, says C. J. Gilbert, that the examination might be upon the bill without interrogatories drawn and framed, as the examination with the canonists may be upon the libellus articulatus; but afterwards the Master of the Rolls having left the examination of his witnesses to his clerks, as the Barons of Exchequer did to theirs, from thenceforward the counsel for the party whose witnesses were to be examined, framed the interrogatories, upon which the clerks examined. These clerks have now become regular officers of the Court, the examiners, through whom in London, as through commissioners elsewhere, written answers are procured to written interrogatories. Such is the ordinary and almost invariable course of proceeding. The chief exception is, that papers and documents which come under the technical description of Exhibits, are, under certain rules allowed to be proved, viva voce, at the hearing.

The old rules and practice of Chancery confined the proof of papers, by examination of witnesses, viva voce, at the hearing, to deeds and copies of records. And Lord Hardwicke would allow no question to be asked that would admit of a cross-examination. The examination was restricted to three or four very simple points, such as the custody and identity of an ancient document, the accuracy of an office copy, the execution of a deed, where the examinant was the attesting witness, the hand-writing of a letter, receipt, or promissory note, &c. A will, therefore, could not be so proved; for the defendant has a right to a cross-examination, inasmuch as the sanity of the testator may be made a question, and there is more to be proved than the mere execution of the instrument.

In Graves *vs.* Budget, 1 Atkin, 441, an attempt was made to relax the severity of the practice, by a motion for leave that witnesses might prove exhibits at the hearing, and that the defendant might cross examine them: but the indulgence was refused as contrary to the practice of the Court, which was the law of the Court. Its principle was to proceed upon written evidence; and witnesses are examined *viva voce* very spa-

ties to the suit, both plaintiff and defendant, may reciprocally require and use the testimony of each other, upon a bill and cross bill for the purpose.[1] And it is an invariable rule in Equity, that the answer when responsive to the allegations of the

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ringly. They are never examined at large at the hearing. They are only let in to prove exhibits when the application is by the party who is to use them. But modern authorities show a clear relaxation of the ancient practice. The proof of witnesses at the hearing is extended to all kinds of writing as letters, accounts, &c.

In the case of Turner *vs.* Burleigh, (17 Ves., 354,) Lord Eldon went further, and completely overturned the rule to which Lord Hardwicke so pertinaciously adhered; he said, that there might be a cross-examination on *viva voce* proof of an exhibit; and that the Court would examine on the suggestion of any question. This (says Chancellor Kent) was establishing a most reasonable course, for it is unjust to allow of any examination on one side, and not to permit a question to be put on the other. These examinations at the hearing ought, undoubtedly, to be very sparingly used, or they would tend very much to delay and embarrass business, by changing the whole practice of the Court, and giving it a nisi prius character. In my opinion, no paper whatever ought to be proved at the hearing, without satisfactory reasons being assigned why it was not proved in the regular way, before the examiner; when the exhibit is to be proved in Court, the rule ought to apply equally to writings of every description, and a cross-examination be permitted under the direction, and at the discretion of the Court. (Per Kent, Ch.)

[1] The general rule stated in the text, that either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsively to a bill, is subject to some modification. The weight of the answer must from the very nature of evidence, depend in some degree, upon the fact stated; if a defendant asserts a fact, which is not, and cannot be, within his own knowledge, the nature of his testimony cannot be changed by the positiveness of his assertion. 2 Harr. & J., 304; 4 Bibb., 358; 4 Stew. & Porter, 410; 9 Cranch., 153. The principle does not apply to the proof of the execution of a written instrument, which contradicts the answer, by one witness. 7th Porter, 144. The answer of infants by their guardian is a pleading merely, and not an examination for the purpose of discovery. It is not evidence, therefore, in their favor, although it is responsive to the will, and sworn to by their guardians *ad litem*. 5th Paige's, R., 536.

The question has been several times raised in the American Courts, whether the answer of a corporation under their corporate seal, is evidence in their favor, so far as it is responsive to the bill. In 4 Wash., C. C. R., 601, it was decided that the answer of a corporation under its

bill, is conclusive evidence of the matters it contains, unless it is overcome by the testimony of two opposing witnesses, or of one witness, who is sufficiently corroborated, by other circumstances and facts. The defendant's answer, however, is no proof whatever of any distinct facts, which it may set up by way of defence or avoidance, to the charges of the bill. These must be established by independent testimony.

Third; Courts of Equity recognise the general inadmissibility of parol evidence to contradict, or substantially vary the legal import of a written agreement. Such testimony is not only contrary to the Statute of Frauds, but to the maxims of the common law, and the rules of evidence on this, as on most other points, are the same in Courts of Law and Equity. But

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corporate seal was sufficient to prevent the granting of an injunction, or to warrant its dissolution, if granted; and Judge Washington intimated that such an answer would avail the corporation, as evidence at the hearing in the same manner, as if put in by an individual under oath. But in 1st Paige, R., 311, and 6th Paige, 58, Chancellor Walworth, lays down the opposite rule. "Corporations are at liberty to deny every thing contained in the bill, whether true or false. The answer of a corporation, without oath, where the complainant does not require it to be sworn to, or supported by the sworn answer of the officers of the corporation, connot be said to answer the double purpose of a pleading to put the material facts of the bill in issue, and of an examination of the defendant for the purpose of obtaining his evidence in support of the complainant's allegations; and it is for the latter purpose alone, that the complainant makes a witness of his adversary in the cause."

The point is covered by the remarks of Mr. Justice Thompson, in the case of the Union Bank of Georgetown *vs.* Geary, in 5th Peters, Rep., 111, although the question was not expressly decided there. "Although the reason of the rule which requires two witnesses, or circumstances, corroborative of the testimony of one, to outweigh the answer, may be founded in a great measure upon the consideration that the complainant makes the answer evidence by calling for it; yet this is in reference to the ordinary practice of the Court, requiring the answer to be on oath. But the weight of such answer is very much lessened, if not entirely destroyed as matter of evidence, when unaccompanied by an oath. Indeed we are inclined to adopt it as a general rule, that an answer not under oath is to be considered merely as a denial of the allegation in the bill, analogous to the general issue at law, so as to put the complainant to the proof of those allegations." This seems to be the correct rule, and will probably be generally received.

Courts of Equity will receive parol evidence to show that through fraud, accident or mistake, the written instrument does not express the intention of the parties; or to rebut any artificial presumption or equity, not arising out of a proper construction of the instrument itself.[1]

7. What is a decree, and what are some of its incidents?

A decree, is the sentence, or judgment of the Court, pronounced after the hearing or submission of the cause. It may be interlocutory, or final.[2] The former, is properly, a decree, pronounced for the purpose of ascertaining matter of fact, or law, preparatory to a final decree. It very seldom happens, that a first decree can be final, or conclude the cause. The most usual ground, for not making a perfect decree, in the first instance, is the necessity which frequently exists, for a referrence to a Master of the Court, to make enquiries, or to take accounts, or sell estates, and adjust other matters, which are ne-

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[1] Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that the defeasance has been destroyed by fraud or mistake. 1 J. C. R., 594; 4 J. C. R., 167; 6 J. C. R., 417; 2 Cow., 324; 1 Paige's R., 206; 1 Day, 139; 1 Monr., 73; 4 Bibb., 451; 3 Haw., 423; 1 Wash., 14; 3 Mason, 378; 1 Des., 155; 1 Ohio, 490. There must, however, be some proof of fraud or mistake in the execution, or some vice in the consideration. 9 Dana., 108. The student will find most extensive references to the American decisions on the subject in the 3rd volume of Cowen & Hill's edition of Phillips on Evidence, page 1434.

[2] A decree in Chancery, disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties, and awarding the costs; though it appoint a commissioner, to sell part of the subject, and account for, and pay the proceeds to the parties, with liberty to them, to apply to the Court, to add other, or substitute new commissioners, or for a partition of the subject, to be sold in kind, is a final decree; Harvey *vs.* Bronson, 1 Leigh, 108. A decree for the foreclosure and sale of mortgaged premises, is a final decree, and an appeal will lie from the same; 3rd Cranch, 179; 4th Dana, 559; vide also, 7th Paige, 18; 1 J. C. R., 85; 1 McChord's R., 32; 13th Ohio, 420; and Barbour's Chancery Practice, vol. 1, page 326, from which we have borrowed the matter in the text, and where the student will find an accurate and complete exposition of the law, on this subject.

cessary to be disposed of, before a final decision can be made, of the subject matter of the suit.

A decree is *final*, when all the facts and circumstances, material and necessary to a complete explanation of the matters in litigation, are brought before the Court, and so fully and clearly ascertained, on both sides, that the Court is enabled upon a full consideration of the case, made out and relied upon by each party, finally, to determine between them, according to Equity, and good conscience. In other words, when a decree fully decides and disposes of the whole merits of the cause, and reserves no further questions, or directions, for the future judgment of the Court; so that it will not be necessary to bring the cause again before the Court, for another decision, it is a final decree. And a decree may be final, although it directs a reference to a master; if all the consequential directions depending upon the result of the master's report, are contained in the decree, so that no further order of the Court will be necessary, upon a confirmation of the report, to give the parties the full and entire benefit of its previous decision. Of this nature, is a decree, directing land to be conveyed, and appointing a commissioner to convey it; a decree, ascertaining the amount due, directing a sale, and giving costs; or upon a bill for a specific performance, a decree, made on the coming in of a master's report, by which the quantity of land to be conveyed, and the balance of money, to be paid, are ascertained, directing that a conveyance be executed, on such balance being tendered. So, a decretal order, upon which, an execution may be taken out, is a final decree.[1]

A decree, does not, strictly speaking, become a record of the Court, until it has been enrolled; and although the Court itself, after it has been duly settled, and entered, treats it, as the foundation for ulterior proceedings, it is not considered of a sufficiently permanent nature, to entitle it, in other courts, to the

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[1] Prof. Park, in his Lecture on Courts of Equity, very happily describes the more extensive remedial functions, which they possess, arising out of the flexible nature of a decree, and the capacity of the Court, to adapt itself to the particular posture of each case. "A verdict or judgment, is like a fixed pipe, which can only inject water in one course;

same attention that is paid by one Court of record, to the records of other Courts, of the same nature. Until a decree has been enrolled, and thereby become a record, it is liable to be altered by the Court itself upon a re-hearing; while a decree which has been enrolled is not susceptible of alteration, except in a Court of Appeal, or by bill of review. Enrolment is the engrossing of the decree on parchment, and leaving it with the proper officer, which may be done by either party.[1]

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while a decree possesses the power of the hose or flexible pipe, which is directed by turns, from side to side, till every kindling spark of litigation is extinguished. For this, I may appeal to any one, practically acquainted with the complicated and multifarious operations, daily performed by decrees; the almost magical processes, by which order is there drawn out of confusion, in the arrangement of the most embarrassed affairs, and the most involved interests; the variety of parties to which they address themselves; the vast number of events,—past, present, and future—which they embrace and provide for; and the plastic power with which, from their executory, and directive character, they apply themselves to every successive novelty, of combination."

[1] The English practice in reference to enrolment does not generally prevail in this country. A decree is considered as enrolled, when it has been entered on the Journals of the Court, and signed by the chancellor, and the term has elapsed, during which it was made.

INDEX.

A.

Page.

ABATEMENT,

all *general* legacies abate proportionally, on a deficiency of assets, - - 99 *note*

specific legacies only abate after the general legacies have been exhausted, - - 99

legacies founded on a valuable consideration, do not abate rateably with others, - - 99

ACCELERATION OF PAYMENTS,

Courts of Equity will decree the sale of land, when the rents and profits on an *elegit*, will not discharge the debt within a reasonable time, 236

they will more readily direct a sale, where the interest, being of a reversionary character, cannot be immediately reached by an *elegit*, 236 *note*

ACCIDENT,

not exclusively cognisable in Equity, - 20

defined, as such unforeseen event, misfortune, loss, act, or omission, as is not the result of any negligence or misconduct in the party, - 28.

this definition considered imperfect, and another suggested in note, - - - 28 *note*

accidents, two classes of, 1st., such as would deprive a party of a clear right. 2nd, such as would subject a party to an unjustifiable loss, 28

Equity will relieve against the loss of a bond, negotiable note, or other written instrument, - 29

Page.

ACCIDENT,

but party seeking relief, must give a suitable bond of indemnity, - - - - - - 29
jurisdiction has been questioned in case of unsealed instruments not negotiable, - - 29
but seems to stand on a common principle with other cases, - - - - - - 29
relief will be afforded even against a surety, - 29 *note*
Equity will grant relief, where the endorsement of a note at the time of its transfer, is prevented by accident, - - - - - 30
so, where by reason of accident a trust has not been executed at all, or imperfectly, - - 30
Equity will relieve against the penalty of a bond, where indemity is tendered, - - 30
Equity will relieve executor from liability for premature payment of debts or legacies, where the assets, originally sufficient, have been lost by *inevitable casualty*, - - - - 30
or a party to a suit at law, who has been prevented by accident from making his defence in that forum, - - - - - - 30 *note*
revolution, or act of Parliament subjecting a party to undue loss, treated as an accident, 30
relief will be granted where the perfect execution of a mere power is prevented by accident, as where the prescribed witnesses are sent abroad by government, and cannot be obtained; but not where there is no execution, nor in favor of any persons except such as are entitled to peculiar consideration in Equity, 31
soundness of this distinction questioned, - 31 *note*
Equity will not grant relief, when a party is prevented by accident from complying with a positive stipulation in a contract, - - 32
strong case in Virginia, - - - 32 *note*
nor in favor of a devisee, against an heir, 29
nor against a bona fide purchaser for a valuable consideration without notice, - 38
nor where the suffering party has no vested right, - - - - - - - 28

ACCOUNT,

an action of account could only be brought at

Page.

ACCOUNT,

common law, where there was a privity in law, or fact, between the parties, - - - 71
or by one merchant against another, - - 72
it did not lie against wrong doers, nor between joint tenants, or tenants in common, or executors, - - - - - - 72
comparison between the common law, and equitable proceeding in matter of account, 72 *note*
Equity has assumed jurisdiction from the want in many cases, of any legal remedy, or its inadequacy; and to prevent a multiplicity of suits, where the jurisdiction has attached on other grounds, - - - - - 73
Equity has no jurisdiction where there is no *mutuality of dealing*, and a discovery is not required, - - - - - 74 *note*
in a bill for an account both parties considered as actors; and a balance may be found for defendant, - - - - - 76
effect of a stated account, - - - 76, 304
the Court will grant leave to surcharge and falsify a stated account, where there has been fraud or mistake, - - - - 76
the examination takes place before a master, 77
difference between a surcharge and falsification, 77
what is necessary to constitute a stated account, 77
when an acceptance of an account between merchants will be implied, - - - 77
where a demand is of a legal nature, Equity adopts the Statute of Limitations. Where the claim is purely equitable, or no statutory bar, it will not from public policy, entertain a bill after great lapse of time, - - - - 77
See Agents, - - - - - 78
See Apportionment, - - - - 79
See General Average, - - 82
See Contribution, - - - - 83
See Lien, - - - - - 85
See Appropriation of Payments, - - 74
See Rents and Profits, - - - 85
See Waste, - - - - - 86
an account may be decreed on the dissolution of a partnership, - - - - 115

Page.

ADMINISTRATION,

a creditor in an ordinary case may come into Chancery to collect his debt from an executor or administrator, - - - - - 87 *note*

Equity considers executors and administrators as trustees bound to make a proper disposition of the property, - - - - - 87

Equity, in matters of administration, can take an account, compel a discovery, and marshal assets. Hence, the value of its jurisdiction in such cases, - - - - - 88

See Conformity, Bills of, - - - 88

See Creditor's Bills, - - - - 88

See Assets, - - - - - 90

an ancillary administration is one taken out where the assets are locally situate, - - 93

in regard to creditor's, assets administered according to the laws of the country where situate, - - - - - 94

but as to legatees, by the law of the domicil of decedent, - - - - - 94

conflict of authorities as to the rule of distribution, where balance remains on hand after payment of debts, in the country of the ancillary administration, - - - - 94

foreign and domestic administration, independent, - - - - - 96

foreign and domestic creditors placed on an equal footing, - - . 94, 95 *note*

ADVANCEMENT,

when a purchase of real estate is made by a parent, and the conveyance taken in the name of a child, the law will presume that it was intended as an advancement. - - 235

this presumption may be repelled by evidence that purchase was fraudulently made, and a trust raised for the benefit of the creditors of the parent, - - - - - 235 *note*

See Satisfaction, - - - - 213

ADVERSE TITLE,

purchase with notice of, - - -

See Notice, - - - - - 66

Page.

AGENCY,

Equity will compel agents to account, 78
where agent has been guilty of a tort affecting principal's property, the loss sustained will be treated in Equity as a debt against his estate, 78
agent must keep regular accounts and proper vouchers, or he will be deprived of his compensation, - - - - - 79
compelled to account for any clandestine profit, 78
if they mix undistinguishably principal's property with their own, the whole considered that of principal, - - - - - 79
this rule does not hold in all cases against the creditors of the agent, - - - 79 *note*
where a controversy arises between principal and agent, the confidential nature of the relation, renders resort to Equity, for an account, or a discovery almost indispensable, - - 68
See Principal and Agent, - - - 57

AGREEMENTS,

See Specific Performance, - - - 123
" Mistake, - - - - - 33
" Fraud, Constructive, - - - 50

ALIMONY,

is the maintenance which the husband on separation is bound to give his wife, - - 281
it properly belongs to the Ecclesiastical Courts to enforce this right, - - - 281
cases in which it falls within the cognisance of Equity, - - - - - 281
amount of alimony, discretionary with the Court, - - - - - 282
practice in some of the American Courts, 281 *note*
the claim for alimony does not survive the husband, - - - - - 281 *note*
See Ne Exeat Regno,

ANSWER IN EQUITY,

effect of, when it denies the assertions of the bill, - - - - - 11 *note*
must be contradicted by two witnesses, or one witness, and circumstances, - - - 307
qualification of the rule, arising out of the nature of the facts stated, - - - 307 *note*

Page.

ANSWER IN EQUITY,
in the case of corporations, answering under their common seal, - - - - 307 *note*
See Evidence, - - - - 305
effect of answer to a Bill of Discovery,
See Bill of Discovery, - - - 26

APPLICATION OF PURCHASE MONEY,
purchaser must look to its application where he buys property subject to a special and definite trust, - - - - - 216
as where it is created by a private person, and expressed in a deed through which he traces his title, - - - - - 217 *note*
but is not bound to do so, where the trust is general, or the trustee invested with discretion as to the appropriation of the proceeds, 216
or where the trust is created by the law, 217 *note*
purchaser of personal property from executor not required to see to the application of the money, - - - - - 216

APPORTIONMENT,
is the rateable distribution of a claim or charge among persons having different interests or shares in the subject matter, - - 79
difference between entire and severable contracts, 79
Courts of Equity will not apportion *entire contracts*, except on some equitable grounds, such fraud, accident, or mistake, - - - 79
severable contracts apportionable, even at law, 79
Courts of Equity formerly would not apportion *rent*, as to time, - - - - 80
this defect cured by statute in England, and it is presumed in all the States of the Union, - 80
Courts of Equity in some modern cases have decreed an apportionment, - - 80
See Rent,
where several persons have distinct interests in any property, they shall contribute to discharge an incumbrance on it, and Equity will apportion the amount to be paid by each, - 81
tenant for life of an estate, is bound to keep down the interest, - - - - 81
where an estate is sold to discharge an incumbrance, respective proportion to be borne by

Page

APPORTIONMENT,
tenant for life, and remainder man, - - 82
how the balance of the purchase money distributed between them, - - - - 82
rule, where the tenant for life, and in remainder voluntarily sell an estate, without providing for the apportionment of the proceeds, - 81
rule, as to the apportionment of mortgage or judgment, between successive alienees of different portions of land, on which it is a charge, 80
See Average General, Contribution,

APPROPRIATION OF PAYMENTS,
the right to make, belongs to the debtor, if not exercised by him, to the creditor, otherwise to the Court, - - - - - - 74
creditor allowed reasonable time to decide as to the appropriation, - - - - 74 *note*
Court will so apply the payments as to work the greatest equity. Illustrations of this rule, in note, - - - - - 74, 75 *note*
rule of appropriation in case of running accounts, - - - - - - 75
rule of the Roman law, has not been adopted as part of the common law, - - - 75 *note*
conflict among the authorities on this point, - 75 *note*
rule does not apply in the case of a public officer, who has given distinct obligations with different sureties, - - - - 76 *note*

ARBITRATORS,
See Awards. - - - - 290

ASSETS,
distinction between them; are legal and equitable. - - - - - - 90
the legal assets will be distributed in Equity, according to the rules of law, - - 90
an equity of redemption for the most part legal assets, - - - - - - 90 *note*
land charged with the payment of debts generally, deemed equitable assets, - - 90
even as against a specialty creditor, - - 90 *note*
increasing disposition of the Courts to lean towards such a construction of a will, as shall

Page.

ASSETS,

raise a charge for the payment of debts, 1 90 *note*
otherwise as to legacies, - - - - 90
the rule of equality prevails in the administration of equitable assets, - - - 91
Equity will not deprive a creditor of his legal priorities; but if he comes into chancery will postpone his claims on the equitable fund, to those who have no remedy at law, 91
Courts of Equity respect antecedent liens, 91
Marshalling of assets. Where a person has an interest in two funds, the property of one man, he will be restrained from proceeding against that which is alone liable to the claims of another, - - - - - 92
few of the subtle distinctions of the English law applicable in the United States, - - 91 *note*
cases in which the assets will be marshalled, 92
simple contract creditor will be substituted for specially, but not judgment creditor, - - 92 *note*
all debts generally placed on an equal footing in the United States, - - - - 91 *note*
Courts of Equity will not compel a creditor who has two funds to resort to the most tedious and embarrassing remedy, - - 91 *note*
personal estate the primary fund for payment of debts, - - - - - 92
testator may direct otherwise by will, - - 93
the order of marshalling assets, - - 93
assets considered a trust fund, - - 93
a purchaser from an executor of assets, with knowledge of their misapplication, a trustee for creditors and legatees, - - - 93

ASSIGNMENT,

assignment of dower. *See* Dower, - - 107
what will amount to an assignment, - - 195
no technical words necessary, - - 196
difference between a general and special, - 195
Courts of Equity disposed to uphold bona fide assignments, - - - - - 196
although the charter of a bank requires the transfer of stock to be entered on its book, yet an equitable assignment may be made in other modes, - - - - - 195 *note*

Page.

ASSIGNMENT,
no *chose in action* was assignable at common law, - - - - - - 195
Courts of law, at present, to some extent recognise assignments, - - - 196 *note*
the owner of a fund cannot, without the consent of the holder, assign it, in distinct portions, - 196 *note*
equitable jurisdiction was founded upon the want of any remedy at law, and the existence of a trust, - - - - - - 197
whether an assignee may resort to equity, who can use the name of his assignor at law, - 197 *note*
any interest, whether legal or equitable, real or personal, present or contingent, may be assigned, - - - - - - 198
provided, it does not savor of maintenance, and is consistent with public policy, - - 198
these torts which die with the person, or a naked right to litigate, not assignable, - 198
an expected bounty cannot be assigned in advance, - - - - - 199 *note*
insolvent debtor may prefer creditors in an assignment of his property, - - - 199
so may an insolvent corporation, - - 65 *note*
a trust for the benefit of creditors will enure to each rateably, unless it is provided otherwise in the deed, - - - - - 199 *note*
the law will not permit a voluntary assignment to grossly incompetent or insolvent trustees, 199 *note*
assent of creditors to trust, when presumed, 200 *note*
See Constructive Fraud. - - - 50
where there are different assignees of the same equitable interest, he who first gives notice of his title to the holder of the legal interest, has priority, - - - - - 194

ATTORNEY,
See Client and Attorney, - - - 56

AUCTIONS,
See Positive Fraud, - - - 44
See Statute of Frauds, - - - 131 *note*

AVERAGE GENERAL,
definition of, - - - - - 82
difficulty of adjusting it at law, from number of

Page.

AVERAGE GENERAL,
parties, and necessity of taking an account, has led to the Equitable jurisdiction, - 82

AWARDS,
Courts of Equity will decree the specific performance of an award, - - 291, 290 *note*
but not of an agreement of reference, - - 290
awards may be set aside in Equity, which have been obtained through fraud, accident, or mistake, - - - - - 291
powers and duties of arbitrators, - - 29
Equity will not set aside an award for mistake in matter of law, unless arbitrators have exceeded their power, or intended to be governed by the law, and decided erroneously, - 291
principles applicable to special awards, - 291 *note*

B.

BONDS,
the loss of, relieved in Equity, - - 29
penalty of, relieved against in Equity, - 30
See Penalties and Forfeitures, - - 254
Equity will correct mistakes in the execution of a bond, - - - - - 38
even when form prescribed by statute, and against sureties, - - - - 38 *note*
Equity will consider a joint bond for money as joint and several, where the loan is joint, 39
but not as against securities, - - 39
See Constructive Fraud, - - - 50

BONDS, POST-OBIT,
treated sometimes as void, in other cases, as a security for what is *ex equo et bono* due, 62

BARGAINS, CATCHING,
See Constructive Fraud.

BOUNDARIES, CONFUSION OF,
to induce Equity to take jurisdiction, some equitable consideration must supervene, such as the fraud, or negligence of a party bound to preserve the boundaries, - - - 103
or the prevention of a multiplicity of suits, or of irreparable injury, - - - - 104
Courts of Equity appoint a commission to ascertain the boundaries, - - - 104

Page.

C.

CANCELLATION,
Courts of Equity will decree the cancellation of a void deed, which may be used to the injury of another, - - - - - - 121
not however if the illegality is apparent on its face, - - - - - - 122
semble, a conflict of authority on this point, 121 *note*

CHANCELLOR,
in England, has common-law jurisdiction, to hold pleas of recognisances acknowledged in Chancery, writs of scire facias for repeal of letters patent, writs of partition, and personal actions by or against any officer of the Court, 14 *note*
present organization of the Court of Chancery, in England, - - - - - 18 *note*

CHARITIES,
jurisdiction of Equity over charities of an indefinite nature, has mainly sprung up since statute of Elizabeth, - - - - - 219
Commissioners of the Public Records have discovered many cases, prior to that statute, - 219 *note*
where the charity is definite and lawful, it is in the nature of a trust, and Equity will regulate it, - - - - - - 220
charitable uses defined, - - - 220
lawfulness of a provision excluding ecclesiastics from the management of a charity, - 221 *note*
charities are greatly favored in Equity, - 222
doctrine of *cy pres*, and extravagant length to which it was formerly pushed, - - 223 *note*
greatly modified at present in England, - 224
has been generally repudiated in America, 223 *note*
is it an implied condition of a gift to a religious society, holding the opinions of the donor, that they should continue to be taught—conflicting authorities examined, - - 225, 226 *note*
Equity will generally enforce the execution of a foreign charity, where the trustees are amenable to its process, - - - - - 228
miscellaneous points connected with charities, - - - - - 228, 229 *note*

CHATTELS,
specific delivery of. *See* Delivery,

Page.

CLIENT AND ATTORNEY,
transactions between, regarded with great jealousy, - - - - - - - 56
onus upon the attorney to show their perfect fairness, - - - - - - 56
gift made to, *pendente lite*, void, - - 56
these principles no longer applicable when the relation has been completely dissolved, - 57

COLLUSION WITH FIDUCIARIES,
as executors, or administrators in misapplication of assets, - - - 68, 93, 217

COMPENSATION AND DAMAGES,
decreed in Equity as an incident to other relief, 135
illustrations, - - - - 135 *note*
whether Equity will entertain a bill by the bona fide possessor of land, against the true owner who has evicted him, - - 136
amount of compensation generally ascertained, by directing an issue, or reference to a master, 136
See Partition,
See Constructive Fraud.

COMPOSITIONS,
secret, between insolvent debtors and creditors, giving preference, void, - - - 65

COMPROMISE,
principles applicable to, - - - 36
family compromises favored in Equity, - 36
a compromise does not involve the question of a mistake of law, - - - - 36 *note*

CONCEALMENT,
See Constructive Fraud.

CONDITIONS,
See Constructive Fraud.

CONFORMITY,
a bill of, is one filed by an executor or administrator against creditors generally, to have their accounts adjusted. Not favored, - 88

CONSIDERATION, INADEQUACY OF,
does not, *per se*, avoid a contract, - - 48
relief will be granted, where it is so gross as to shock the moral sense, - - - 49

CONTRACTS,
See Frauds, Specific Performance, Apportionment.

Page.

CONTRIBUTION,
Equity will not enforce contribution among wrong-doers, - - - - - 82 *note*
where there is an equitable obligation to share a burthen, Equity will enforce it, - - 82
this principle applied to the owners of a party wall proper to be rebuilt, to co-sureties, where one has discharged the obligation, to legatees who have received their shares before payment of debts, to partners, to tenants in common, etc. 82
foundation of equitable jurisdiction, - 83
contribution among sureties only applies to those whose situations are equal, - - 83 *note*
sureties entitled to the benefit of all securities taken by any one of them, - - - 83
also, to all collateral securities of the creditor, 84
surety cannot take from creditor an assignment of a debt, which he has paid, - - 84
surety who has paid a bond debt treated as a simple contract debtor, in marshalling assets, 84
this rule not universal in the United States, 84 *note*
See Principal and Surety.

CONVERSION OF PROPERTY, EQUITABLE,
doctrine, founded on the maxim of regarding that as done, which has been agreed to be done, 236
when land deemed money, or money land, 236
does not apply as between representatives of testator, without clear expression of intention, 236

COPY RIGHT,
Courts of Equity will interfere by injunction to restrain the violation of a copy right, - 162
unless the work is immoral or libellous, - 163
extent to which this doctrine has been carried, 163 *note*
Equity will not restrain the fair use of common materials, or reasonoble quotation from a book, or a *bona fide* abridgement, - - - 163 *note*
what constitutes a violation of copy right, 164 *note*
what may be the subject of copy right, - 165 *note*
practice of the Court on injunctions of this nature, - - - - - - 163

CORPORATIONS,
may prefer creditors, in a general assignment, 65
capital stock of, a trust fund for payment of debts, - - - - 242, 243 *note*

Page.

COURTS OF EQUITY,
distinctions between them and courts of law, 10
difference between the rights which they recognise, and the remedies which they furnish, 10
The former
1. Have cognisance of trusts, - - 10
2. Will control and vary the legal rights of parties, on equitable considerations, - 11
3. Will compel the specific performance of a contract, - - - - - 11
4. Will interfere by injunction to prevent injury, 11
5. Try causes without a jury, except under special circumstances, and address themselves to the conscience of defendant, - - 11
but require more than one witness to prove assertion positively denied by answer, - 11
6. From flexible nature of their decrees may adapt themselves to the precise posture of each case, - - - 11, 311
7. May bring all parties interested before them, 11
at the present day regard precedents, and are bound by technical rules, - - - 17
See Equity, Jurisdiction, Maxims of Equity,

CREDITOR'S BILLS,
a creditor may file a bill in Chancery for the payment of his own debt and the discovery of assets, - - - - - 88
conflict of authorities on the question whether the decree on such a bill will be for his own debt alone, or for the benefit of all the creditors, 89 *note*
no creditor enjoined from proceeding at law before a decree against personal representative, 89

CREDITORS,
See Marshalling of Securities, Constructive Fraud, Partnership,

CY PRES,
See Charities, - - - - 218

D.

DAMAGES, LIQUIDATED,
Courts of Equity do not relieve against, - 254
how distinguished from a penalty, - - 255 *note*

DEBTOR,
may give preference among creditors, - 64

Page.

DEBTOR,
colluding with personal representative answerable in Equity, - - - - 68

DECREE,
difference between final and interlocutory, - 309
when a decree becomes a record, - - 311
effect of the enrollment of a decree, - - 311
remedial capacity of Courts of Equity, arising out of the flexible nature of a decree, - 311 *note*

DEEDS,
See Mistake, Fraud, Accident.

DEED OF TRUST,
how distinguished from a mortgage, 191, 192 *note*
the trustee is the agent of both parties, 192 *note*
when an injunction will be granted to stay proceedings under, - - - - 193 *note*
other points connected with, - - 193 *note*

DELIVERY UP OF INSTRUMENTS,
when it will be decreed, - - 121

DELIVERY OF SPECIFIC CHATTELS,
will be decreed, where damages would not afford sufficient compensation for their loss, 122

DELIVERY OF POSSESSION,
judicial writ of injunction, will lie for, - 149

DEPOSITIONS,
form, in which evidence is taken in Equity, - 306
viva voce evidence allowed to prove exhibits at the hearing, - - - - 306
when cross-examination will be allowed, - 306 *note*

DISCOVERY.
cases in which a party who comes into Equity for discovery and relief, may obtain relief, as an incident to the discovery, - - 25
rule of the American authorities more uniform than the English, - - - - 25
the bill in such case must aver, not only the materiality of the facts, but the inability of the plaintiff to establish them without a discovery, 26
this is not necessary, where the bill does not seek relief, but simply a discovery, - - 298
what the plaintiff must show to maintain a bill of discovery, - - - - 299

Page.

DISCOVERY.

what are sufficient objections to a bill of discovery, - - - - - - 299 *note*
bill of discovery must be dismissed, if answer wholly denies matters of which a discovery is sought, - - - - - - 26

DONATIO MORTIS CAUSA.

is a gift of personalty, by one in peril of death, to be recoverable in case of recovery, - 101
takes effect by delivery - - - 101
requires no assent from executor, - - 101
it is ambulatory and liable for debts, - - 101
a mere *chose in action* not subsisting in any specific instrument, not the subject of a donatio mortis causa, - - - - - 101
such a donation may consist of bank notes, bonds, and mortgages, - - - 101
whether the complete legal dominion over the thing given, must pass to the donee, - - 102
it seems that a donatio mortis causa may be the subject of a trust, - - - 102 *note*
may be delivered to a third person, - - 102 *note*
conflict of authorities, whether the promissory note of donor himself to donee, may be the subject of - - - - - - 102 *note*

DOWER.

resort to Equity almost universal for the assignment of dower, - - - - 106
jurisdiction exclusive, where the title is equitable, - - - - - - - 106 *note*
Equity may compel a discovery, or remove an impediment to a recovery at law, or decree an account of rents and profits, - - 107 *note*
jurisdiction where dowable lands are in possession of various persons, - - - 106
rule for estimating the value of dowable lands in the hands of a purchaser, - - - 107 *note*
Equity has no jurisdiction where the legal title is in dispute, - - - - 107
legal title will be enforced against a bona fide purchaser, for a valuable consideration, without notice, - - - - - - 107 *note*
but equitable relief will not be afforded, - 107 *note*

Page.

DOWER.

widow is generally dowable of an Equity of redemption in the United States, but it is otherwise in England, - - - - 105 *note*
origin of the anomalous distinction which prevails in England, between dower and courtesy of trust estates, - - - - 173
when the widow of a partner will be endowed of land, belonging to the partnership. - - 105 *note*

DRAMATIC PERFORMANCE.

injunction will lie to restrain piracy of - - 167

DRUNKENNESS.

Courts of Equity will not set aside a contract, made under the influence of, unless it was excessive, - - - - 47 and *note*
but will not enforce a contract entered into under, - - - - - 47

DURESS.

sufficient to invalidate contracts made under, 46
imprisonment under legal process, does not constitute, - - - - - 46 *note*

ELECTION. E.

principle upon which the doctrine is founded, 209
applicable to every kind of instrument, - 209
party may be concluded in a Court of Common Law, from the assertion of inconsistent claims, but cannot be put to election, - - 209
aid of Equity indispensible, when cross equities to be adjusted, - - - 209
an election is most frequently required, when the instrument bestowing a gift, makes a disposition of some portion of the donee's property, 209
election not extended to creditors, - - 209
but not affected by the character of the property disposed of, - - - - 209
American cases containing a discussion of 208 *note*
when enforced against feme covert or infant, 208 *note*
when the Court may elect for infant, - 209 *note*
devisee under a will may receive property through another, which was taken by such person in opposition to the will, - - - 209 *note*
devisee electing against the will, does not for-

Page.

ELECTION.

feit the whole devise, but takes it subject to a trust for the disappointed legatee, to the amount of interest, intended to be conferred by the testator, - - - - - - 210
party will not be put to an election, unless it is apparent that the testator intended it, - 210
dower being a clear legal right, widow not required to elect between it and a devise or legacy, unless testator expressly declares such an intention, or it is manifestly implied, - 211
to bar the widow of her dower by implication, the provisions of the will must be absolutely inconsistent with the claim, - - - 211 *note*
reference to American cases, - - - 211 *note*
party cannot be put to an election by evidence, *de hors* the will, - - - - 210 *note*
where a will is good, to pass personal not real estate, legatee only put to an election, when an express condition to that effect is annexed to the bequest, - - - - 211
election may be presumed from an act of the party, which indicate such an intention, - 212
party will only be compelled to elect, when he can do so intelligently and deliberately - 212

EQUITY.

descriptions of, in the older books, vague and imperfect, - - - - - - 9
defined, as that portion of remedial justice exclusively administered in Courts of Chancery, 10
has existed in some form, *ex necessitate*, in almost all civilized countries, - - - 9 *note*
administered by the Roman Prætor, though not in a distinct tribunal, - - - 10 *note*
designed to provide for "the correction of that wherein the law, by reason of its universality fails," - - - - - 10 *note*
See Jurisdiction of Equity, Courts of Equity, Maxims of Equity,

EQUITY OF WIFE TO A SETTLEMENT.

See Married Women, - - - 277

EVIDENCE:

parol admitted in Equity, to vary or control

Page.

EVIDENCE.

written contracts, when through fraud or accident, they do not express the intention of the parties, - - - - - 309, 39
parol may explain *latent* ambiguity in will, 40
parol evidence admissible to rebut a presumption, - - - - - - 309
to show that an absolute deed was intended as a mortgage, - - - - - 309 *note*
Courts of Equity require less evidence to establish fraud than Courts of Law, - - 43
general rules of, same in both Courts, - 305
three leading points of difference, - - 306
See Answer, - - - - 307
See Depositions, - - - - 306

EXECUTORS AND ADMINISTRATORS.

See Trusts, - - - - - 169 230
See Wills and Testaments, - - - 201

F.

FORFEITURES.

Courts of Equity will relieve against, where the condition is merely a security for the payment of money, - - - - - - 256
in other cases, the modern authorities are opposed to the interference of Equity, - - 256
they will not interfere where the forfeiture has been imposed for public or corporate purposes, 257
bill of discovery does not lie, where party would be subjected to forfeiture, - - 299

FRAUD.

Courts of Equity careful not to define it, - 43
it includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, injurious to another, - - - 43
comparative extent of the two jurisdictions, to relieve against fraud, - - - 43
some general points relative to, - - 42 *note*
distinction between actual and and constructive, - - - - - - - 44, 51

ACTUAL FRAUD.

Suggestio falsi, an actual fraud, against which Courts of Equity will relieve, - - 44
may be by acts, as well as words, - - 44

Page.

FRAUD.

but the misrepresentation must be material, and of matters, as to which one party is presumed to rely on the other, - - - - 45
and the party must actually have been deceived, - - - - - - 45
any suppression of facts which a party was under a legal or equitable obligation to communicate, will furnish ground of equitable relief, 45
suppressio veri does not exist except in cases involving an obligation to communicate all material facts, - - - - - - 46
when the rule of *caveat emptor* applies, - 46
contract treated as fraudulent, where undue advantage is taken of the imbecility or duress of party, - - - - - - 46
the acts of drunkards relievable in Equity, where the drunkenness was excessive, or induced by fraud, - - - - - 47
contracts with infants and feme coverts, generally voidable, as fraudulent, - - 48
the law will not permit these disabilities to protect fraud, - - - - - 48 *note*
such inadequacy of consideration as shocks the conscience, a proof of fraud, - - 48 9
various cases of positive fraud, in which Courts of Equity will interfere, enumerated, - - 49
See Statute of Limitations.

FRAUD CONSTRUCTIVE,

constructive, includes all acts or contracts, whether originating in an evil design or not, tending to mislead others, or to injure the public, - - - - - - - 51
First class of, are those contrary to the general policy of the law, - - - - - 51
1. Marriage brokage contracts, and other agreements injuriously affecting the marriage relation, - - - - - - 51
these are void, and incapable of confirmation, 51
2. All contracts or conditions in general restraint of marriage, void, - - - - - 52
distinction between conditions, precedent and subsequent, as attached to, real or personal property, - - - - - 52, 53

Page.

FRAUD, CONSTRUCTIVE,
3. contracts in general restraint of trade, treated as fraudulent, - - - - 53
limitations of this doctrine, - - - 53 *note*
4. gaming, and usurious contracts, and such as impair the freedom of elections, and contracts for buying or selling public offices, treated as fraudulent, - - - - 54
5. contracts contra bones mores, void, - - 54
See Participes Criminis, . - - 54
second class of, are those, in which a relation of trust and confidence has been abused, - 55 *note*
See Parent and Child. - - - 55
See Guardian and Ward. - - - 56
See Client and Attorney. - - - 56
See Principal and Agent, - - - 57
See Trustee and Cestui que Trust, - 57
See Principal and Surety, - - 58
third class, where the act or contract is *mala fide* as to third persons, - - - 59
seamen relieved from contracts for their wages or prize money, when imposed on, - - 60
in contracts with heirs, reversioners, and expectants, there must be the utmost good faith, or Equity will relieve them, - - - 60
See Bonds, Post Obit,
See Fraudulent Conveyances,
See Composition,
it is a fraud if one person produces designedly on another, a false impression to his injury, - 66
as, when a man having title to an estate stands by, and encourages a sale to an innocent person, [66
or the erection of improvements by such person, 66
See Purchaser.
See Notice.
in England, voluntary conveyances of real estate are void against subsequent purchasers, though made bona fide, - - - - 69
the contrary doctrine more generally received in the United States, - - - 69
See Tacking.

FRAUDULENT CONVEYANCES,
discussion of this subject, and the interpreta-

Page.

FRAUDULENT CONVEYANCES,
tion of the Statute of 13 Elizabeth, against conveyances in fraud of creditors, - 63, 64
voluntary conveyance good, unless fraudulent, 62
when in favor of wife or children, by person not indebted at the time, cannot be impeached by subsequent creditors, merely because voluntary, - - - - - - - 63
doctrine of Chancellor Kent, is, that "Fraud in a voluntary settlement, is an inference of *law* as to *existing* debts, - - - - 63
in England, to make a voluntary settlement void against creditors, it must transfer property liable to execution, - - - - 64
Chancellor Kent, *contra*, - - - 64
See Release.
See Debtor.
See Settlement.
Equity will not grant relief, where the covenous grantee has conveyed to an innocent purchaser, - - - - - 65
conveyance for the purpose of delaying creditors void, even where consideration valuable, 63
reservation by a debtor of a part of his property on a general assignment for benefit of creditors, renders the deed fraudulent, - - 64 *note*
it is a vexed question whether a debtor may rightfully stipulate for a release, as a condition of the assignment, - - - - 64 *note*
fraudulent conveyance can only be impeached by judgment creditor, - - - 67 *note*

FRAUDS, STATUTE OF,
when it will furnish a good defence to a suit in Equity, - - - - - - 303
what will take a case out of the operation of the statute, - - - - - 130
See Specific Performance.

G.

GAMING CONTRACTS,
relation of the parties to each other, - - 55

GUARDIAN,
See Trusts. - - - 250

Page.

GUARDIAN AND WARD,
cannot deal with each other, during the existence of the relation, - - - - 56
and even after it has ceased, without the fullest proof of good faith, - - - - 56
appointment of guardian by Court of Chancery, 260
duties and powers of, in reference to his ward's estate, - - - 260, 261 *note*
Chancery may exercise a general superintendence over, - - - 258, 259
extent to which this jurisdiction has been carried, in directing the education of ward, - 258 *note*
See Infants.

H.

HEIR-LOOMS,
Courts of Equity will compel the specific delivery of, - - - - - 122

HEIRS AND EXPECTANTS,
contracts with, in reference to their expectancies, will be set aside, unless there has been the utmost good faith, - - - - 60

HUSBAND AND WIFE,
See Married Women.

I.

IDIOTS AND LUNATICS,
See Fraud.
Courts of Equity only apply the maxim, that a man shall not be permitted to stultify himself, to acts done in prejudice of others, - - 47
in exercising jurisdiction over, Chancellor acts as delegate of the crown, - - - 263
proceedings in Equity, to ascertain the fact of idiocy or lunacy, - - - - 264
practice in New York, - - - 264 *note*
what degree of imbecility sufficient to authorize the Court, to commit the person and property of a freeman to another, - - 263 *note*
power which the Court will exercise over the estate of a lunatic, - - - - 264 *note*

Page.

IGNORANCE OF LAW,
when it is a ground of relief in Equity, - 34
See Mistake.

IMMORAL CONTRACT,
See Fraud Constructive. - - - 54

INFANTS,
the jurisdiction of Chancery over, is a branch of the prerogative of the crown, - - 258
the Court does not interfere, unless the infant has property, - - - - - 258
it may appoint, control, or even remove a guardian, - - - - - - 258
its power extends to removing an infant from the custody of its parent, when it is imperatively required by the interests of the child, - 259
in a controversy between the parents, it will ordinarily commit the child to the custody of the father, but if of very tender years, to the mother, - - - - - 259
American cases on this subject, - 259, 260 *note*
what will constute an infant, a ward of Chancery, - - - - - 250
the Court will prevent the improper marriage of its ward, or punish all persons abetting it, - 262
the power to sell infant's real estate derived from statute, and does not to this day exist in England, - - - - - 261 *note*

INJUNCTIONS,
the difference between a judicial writ and a remedial writ of, - - - - 149
the judicial writ has become obsolete, - 149 *note*
the injunction must be specifically demanded, 150
when a party has misled others by gross laches in the assertion of his rights, a Court of Equity will not assist him in enforcing them against the persons thus deluded, - - - 150
the writ of injunction is addressed, not to the Court in which the proceedings have been had, but to the parties, prohibiting them from proceeding in the cause, - - - - 152
its object is to prevent an unfair use being made of the process of a Court of Law, - 152

Page.

INJUNCTIONS,

Courts of Equity will restrain proceedings at law,

1st. where the rights of the party are equitable, and therefore incapable of assertion in that Court, - - - - - - 152

2nd. where from circumstances beyond its cognisance, the forms of a Court of Law would be abused, as where a party has been prevented by fraud or accident from making his defence at law, - - - - - 153 *and note*

3rd. where that course is necessary to maintain its own jurisdiction, as in the protection of its officers from responsibility for acts done by its order, - - - - - - 154

extent to which this doctrine has been carried, and its application in America, - - 154 *note*

4th. where they lead to vexatious and oppressive litigation, - - - - - - 155

Courts of Equity will not suffer a defendant, who has been discharged from a contract, by a foreign tribunal, to be again molested, - 155

when Courts of Equity will restrain the sale of real estate on execution, - - - 150 *note*

they will not ordinarily enjoin the wrongful sale of personal property, but leave the owner to his action for damages, - - - 150 *note*

an exception recognised in the Southern States, in the case of slaves, - - - 150 *note*

Equity will not interfere to stay proceedings,

1st. of a criminal nature, - - - 156

2nd. for matter of which a party by proper diligence might have availed himself at law, - - 156

3rd. for a defect of jurisdiction, or an erroneous decision of a question of law, - - - 157

the Federal Courts have no power to enjoin proceedings in the State Courts, nor the latter in the former, nor a Court of one State, in that of another, - - - - - - 157

a Court of Equity will not interfere by injunction to prevent a public nuisance, unless the evidence of its character, is clear, - - 157

Courts of Equity will restrain the vexatious alienations of real property, pendente lite, - - 157

Page.

INJUNCTIONS,
they will restrain the commission of waste, - 158
whether this jurisdiction extends to a case, where there are adverse claims, - - 158 *note*
they will restrain many acts not esteemed waste at law, which have hence been called equitable waste, - - - - - 158
they will restrain or abate a private nuisance in a case of great necessity, - - 159
they will, under some circumstances, restrain the alienation of personal property, as where it possesses peculiar value in the eye of its owner, 160
Courts of Equity will prevent the transfer of stock, pendente lite, - - - - 160
they will protect a party in the enjoyment of rights conferred by statute, - - - 159 *note*
Courts of Equity will restrain the infringement of patents for inventions, and the violation of copy-rights, - - - - 161
See Copy-right, Patent.
an injunction will be granted to protect the good will of a trade, or a newspaper, - - 167 *note*
Courts of Equity recognise and will protect all unpublished manuscripts—even plays which have been acted, - - - - 165
when the publication of private letters will be restrained, - - - - - 166 *note*
Courts of Equity will restrain a party from the commission of acts, inconsistent with his legal obligations—as an attorney from disclosing professional secrets, - - 167, 168
they will not restrain the publication of a libel, or a criminal offence not connected with property, - - - - - 168
they will interfere by injunction to prevent the sudden dissolution of a partnership, - - 115

INTERPLEADER,
the remedy of interpleader very limited and imperfect at law, - - - - 138
when relief will be granted in Equity, - 138
a party must be in possession to sustain a bill of interpleader, - - - - 137 *note*
it is no objection to a bill of interpleader that one of the defendants is out of the jurisdiction, 138 *note*

Page.

INTERPLEADER,
the tenant cannot dispute the title of his landlord by filing a bill of interpleader, - - 139
nor the agent, of his principal, - - 139
when a bill will lie on behalf of an auctioneer, 139 *note*
sheriff cannot file a bill of, where adverse claims are set up, to goods which he has seized, 140
bills in the nature of, - - - 140

ISSUES,
when Courts of Equity will refer a question of fact to the decision of a jury, and mode in which an issue is prepared, - - - 296
the Court will not award it, unless the aid of a jury is necessary, - - - - 296 *note*
where the validity of a will is contested, an issue devisavit vel non, will be granted, of course, - - - - - 295 *note*
proceedings at law, are under the control of Equity, - - - - - 296
when a question at law will be referred to the Common Law Courts, - - - 296

J.

JOINT CONTRACTS,
See Bonds, - - - - - 39

JOINT TENANCY,
not favored in Equity, - 24 *note* 134
Equity will enforce contribution between joint tenants, - - - - - 83

JURISDICTION OF COURTS OF EQUITY,
1. Equity has jurisdiction where there is no plain, complete, and adequate remedy at law, - 12
vagueness of this test, - - - 12 *note*
2. will not loose it when once acquired, by subsequent extension of the law jurisdiction, - 12
3. divided into concurrent, exclusive, and auxiliary, - - - - 13
4. Equity has no criminal jurisdiction, but may compel a party proceeding criminally, as well as in Equity, to elect one remedy and abandon the other, - - - - - 13

Page.

JURISDICTION OF COURTS OF EQUITY,

5. Equity jurisdiction, according to Lord Hardwicke, the residuum of that of the Aula regis, 15
this theory confirmed by the investigations of the Commissioners on the Public Records, - 15
6. Equity Jurisdiction first exercised in cases of trespass, assault, and to obtain redress from individuals protected by some officer of the county, where injury occurred, - - 15
7. extended by references from Parliament to the Chancellor of Petitions, by the invention of uses of land, and the writ of subpœna, - 16
8. capable of indefinite expansion, so as to meet the growing wants of society, - - 17
9. conferred by the Constitution on the Federal Courts, - - - - - 17
exists in various forms in the several States, 18
it is no objection to the Federal jurisdiction in Equity, that there is a remedy under the local law, - - - - - 18 *note*
Equity jurisdiction, according to Lord Coke, confined to fraud, accident and trust, - - 19
this description, imperfect, - - - 19
Laussat's philosophic classification of, - - 20
where the Court has acquired jurisdiction for one purpose, it will be ordinarily be retained for others, - - - - - 26 *note*
æquitas agit in personam, is a rule of, - 26 *note*

JURISDICTION, CONCURRENT SUBJECTS EMBRACED UNDER, - - - 27 *note*
Court which first acquires jurisdiction will retain it, - - - - - 13 *note*

JUDGMENT,

Equity grants no relief against, because the point of law adjudicated differently afterwards, 37
binds debtors equitable estate in Equity, - 237 *note*

L.

LAPSE OF TIME.

on what principle a bar in Equity, - 303 *note*

LEGATEE.

a legatee may file a bill in analogy, to a credit-

Page.

LEGATEE.

or's bill, in behalf of himself and other legatees, 88 *note*
what is a sufficient description of, in a will, 206 *note*

LEGACY.

no action at law for legacy, unless executor assent thereto, - - - - - 97
jurisdiction of Chancery over legacies universal, from the want of a remedy at law, from its power to compel a discovery, take an account, marshall assets, and impose terms on the parties, - - - - - 97 98
the *leaning* of the Courts is, to construe a legacy to be general, rather than specific, - 98 *note*
various illustrations of this tendency, - 98 *note*
on a deficiency of assets, the general legacies must abate, but the specific legacies are not abated until general legacies exhausted, - 99 *note*
as general rule, legacy not due till the end of a year, after testator's death, - - 99 *note*
executor deemed trustee, as to undisposed surplus of personalty, if a presumption from will arises, that he should not have it, - - 99
where a pecuniary legacy is payable *in futuro*, executor shall give security or bring money into Court, - - - - - 100
but not where the legacy is specific, unless there is danger of waste, - - - 100
a legacy is lapsed, if legatee dies before testator, unless otherwise provided, - - 100 *note*
distinction between a lapsed devise of real and personal estate, - - - - 100 *note*
when to be deemed satisfaction of a debt, - 214 *note*
See Donatio mortis causa.
distinction between a general residuary bequest, in a will of personal and of real estate, 205 *note*

LIEN.

what is, and in what cases it exists, - 85
ground of the equitable jurisdiction to enforce liens, - - - - - - 85
liens exist in equity, independently of the possession - - - - - - 236
vendor of personal property has no lien for the unpaid purchase money, although it is still in hands of vendee, - - - - 236 *note*

Page.

LIEN.

where there is a lien on persoaal property, it may be enforced in Equity, - - - 241 *note*
but vendee of real estate holds the land in trust for vendor, until purchase money has been paid, 237
recognition of this lien in the United States, 237 *note*
lien exists against representatives of vendee, and purchasers with notice, - - 240
but not against subsequent incumbrancers, whether legal or equitable, for a valuable consideration, without notice, - - - 237 *note*
it may be enforced for the benefit of third persons, - - - - - - 239
as the representatives of the vendor, - - 239 *note*
conflict of authorities, as to whether it passes to the assignee of the vendee's bonds, - 238 *note*
whether the lien will be enforced, where the vendor can recover the money at law, - 237 *note*
the lien may be waived, by taking independent security, - - - - 240
this question cannot be raised, where vendor retains the title, - - - - 240 *note*
when Courts of Equity will raise a lien for the benefit of a person, who has expended money or labor on the property of another, - 241
a trust in the nature of a lien, follows trust property, into the hands of all persons, having notice of it, - - - - 241
See Trusts.

LIMITATIONS, STATUTE OF.

Equity follows the analogy of the law, in reference to, - - - - - 23, 303
how applied to trusts, - - - 301 *note*
will not, as between trustee and cestui que trust, affect those direct trusts, which are solely cognisable in Equity, - - - - 302 *note*
not applicable in England, to claims for legacies, but probably otherwise in this country, 303 *note*
in some of the States is no bar to the claim of dower, - - - - - - 303 *note*

LIS PENDENS.

is constructive notice to subsequent purchasers, 67
from what time a bill in Chancery against an absent defendant, will operate as, - - 67 *note*

Page

LUNATICS.

See Idiots and Lunatics.

M.

MAINTENANCE AND CHAMPERTY.

Equity will not support assignments, savoring of 198

MARRIAGE.

contracts in restraint of void, - - - 51

See Constructive Fraud.

MARRIED WOMEN.

Courts of Equity will enforce both the ante-nuptial and post-nuptial contracts of a married woman with her husband, when founded on a valuable consideration, - - - 267

a married woman may sustain the relation of creditor to her husband, - - - 267

where she pledges her separate estate for his debt, is entitled to the privileges of a surety, 267 *note*

modes in which she may acquire a separate estate, - - - - - - 268

a gift to, will be protected from the marital claim of husband, where such an intention is clearly expressed, - - - - 268

what words are sufficient to establish such an intention, - - - - - 270

the intervention of trustees not necessary, - 268

validity of a clause against anticipation, - 271

what will furnish evidence of a gift, by a husband to wife, - - - - 269 *note*

some gifts, from their nature, will be considered as designed for the separate use of a married woman, as mourning rings, - - - - 271 *note*

a married woman is treated in Equity, for most purposes, as a *feme sole*, in reference to her separate estate, - - - - 274

it is not liable for her general engagements, though such is the tendency of the modern decisions, - - - - - 274

extent of her power over, - - - 275

she may bestow it upon her husband, - 276

Courts of Equity will not assist a husband in recovering his wife's property, unless he will make a suitable provision for her, - 277, 278

this Equity of the wife to a settlement gener-

Page.

MARRIED WOMEN,
ally recognised in the United States, - 277 *note*
it will be enforced not only against the husband, but his representatives or assignees, - 278
it is personal to the wife, and may be lost by her misconduct, - - - - 280
property to which it attaches, - - 280
deeds of separation between husband and wife, how regarded in Equity, - - - 282 *note*

MARRIAGE SETTLEMENTS,
in whose favor the specific execution of marriage articles will be decreed, - - 177
marriage a valuable consideration, and sufficient to support an ante-nuptial settlement, - 177 *note*
who may become a party to a marriage settlement, - - - - - - 178 *note*
the intervention of trustees is not necessary to protect the interests of the wife, - - 178 *note*
marriage articles cannot be rescinded after the marriage, - - - - - 178 *note*
some modern authorties seem to regard marriage settlements as trenching upon the just marital rights of the husband, - - 179 *note*
how personal chattels may be limited, - 180
when necessary to appoint trustees to preserve contingent remainders, and their powers and duties, - - - - - 180
they are under the cognisance of a Court of Equity, - - - - - 181

MARSHALLING OF SECURITIES,
founded, on the principle that one man shall not wantonly use his rights, to the prejudice of another, - - - - - 108
applications of the doctrine, - - 109
a debtor cannot require his creditor to exhaust a distinct security, before bringing a personal suit, - - - - - 109
this question discussed, in reference to the liability of the American loyalists, whose estates were confiscated, subject to their debts, - 108 *note*

MARKS, MERCHANTS,
Equity will restrain their piracy, by injunction, 16 *note*

Page.

MAXIMS EQUITY, FIVE PRINCIPAL, - - 22
1. "Equity follows the law," explained, - 22
qualified in note, - - - - - 23 *note*
2. "where there is eqpal Equity, the law must prevail," explained, and illustrated, - 24
3. "he who seeks Equity, must do Equity," illustrated, - - - - - - 24
4. "Equity delighteth in equality," how applied, 24
strikingly illustrated by aversion to survivorship, - - - - - - 24 *note*
5. "Equity looks on that as done which ought to be done," meaning and extent of this maxim, 24
additional, cited in note from Francis, - 22 *note*
but maxims of natural justice, - - 22 *note*

MISREPRESENTATION,
See Fraud Positive.

MISTAKE,
any unintentional act, omission, or error, from ignorance, surprise, or misplaced confidence, 33
mistake of law not remediable, - - 34
this doctrine controverted in note, and not recognised in many of the States, - - 34 *note*
a release of one joint debtor is a release of all, 35
this doctrine not universal in its application, 35 *note*
partnership debt not extinguished in Equity, by accepting the bond of an individual partner, 35 *note*
Equity grants no relief where one security through mistake of law, is selected in preference to another, - - - - - 35
Equity grants relief where a party by way of compromise, disposes of his property, in ignorance of a plain title, - - - 36
See Compromises.
mistakes of fact when remediable, - - 37
vendee need not disclose facts, enhancing price of commodity, to vendor unless there is some confidential relation between them, - - 37
Equity will correct a written agreement so as to conform to the intentions of the parties, - 38
Equity looks not to the form, but the object of an instrument, - - - - - - 38 *note*
See Specific Performance.
See Wills.

Page.

MISTAKE,
See Bonds.
Courts of Equity relieve against a mistake in the execution of a power, unless it is substantial, - - - - - - - 40
the principle of Courts of Equity in rectifying mistakes is, that the party seeking relief must stand upon some superior Equity, to the party against whom he seeks it, - - - 41

MORTGAGE,
definition of, a mere pledge in Equity, - 185
progress of equitable doctrines in reference to, 184 *note*
validity of mortgages, in which a power of sale is conferred upon mortgagee, - - 186 *note*
nature of the estate of an alien mortgagee, - 187 *note*
no technical language necessary to constitute a mortgage, - - - - - - 187
distinction between mortgages and conditional sales, - - - - - 187 *note*
deposit by a debtor of his title deeds with creditor, amounts to an equitable mortgage, - 188
nature of the Equity of redemption, - 188
liable to the usual incidents of the legal estate, 189
interest of the mortgagee in lands after breach of the condition, - - - - - - 189
remedies of the mortgagee, - - - - 189 *note*
mortgagee in possession liable for the rents and profits, - - - - - - 189
right to redeem belongs to all persons claiming under mortgagor, - - - - 190
may be barred by length of time, - - 190
but cannot be lost by any stipulation at the time of executing the mortgage, - - 190
English and American practice on bills of foreclosure, - - - - 191, 190 *note*
mortgagee after payment of mortgage debt cannot maintain ejectment, - - - 191 *note*
distinction between a mortgage of real and personal estate, - - - - 192
how priority of payment among several mortgagees determined, - - - 193

MULTIPLICITY OF SUITS,
Courts of Equity take jurisdiction to prevent,
See Account. Confusion of Boundaries.

Page.

N.

NE EXEAT REGNO,
origin of the writ, - - - - 293
is in the nature of equitable bail, - - 293
cases in which it will be granted, - - 294
may issue against a foreigner, on demands arising abroad, - - - - 295 *note*
how affected by the abolition of imprisonment for debt, - - - - - 294 *note*

NOTICE,
actual or constructive, - - - 67
constructive notice, such evidence of notice as will raise a presumption, which the law will not allow to be controverted, - - - 67
whatever is sufficient to put a party upon inquiry, amounts to notice, - - - 67
in England mere registration, not constructive notice, - - - - - 67
the opposite doctrine prevails in America, - 67
a *lis pendens*, notice, - - - 67
notice to agent is notice to principal, - - 68
this rule does not extend to a trustee, in an assignment for benefit of creditors, - - 68 *note*
a purchaser with notice of the title of another, is *particeps criminis*, - - - 67
unless he is the sub-vendee of a *bona fide* purchaser for a valuable consideration, without notice, - - - - - 68
how priority of title may be acquired in equitable property, - - - - 193
See Purchaser.

NUISANCE,
See Injunctions.

P.

PARENT AND CHILD.
agreements between, will be considered as fraudulent, unless marked by the utmost good faith, - - - - - 55
See Infants.

PAROL CONTRACTS.
See Specific Performance.

Page.

PARTICEPS CRIMINIS.
will not be relieved in Equity, - - 54
unless the agreement is contrary to public policy, - - - - - 54

PARTITION.
jurisdiction over general, and not necessary, to state in the bill, any peculiar grounds of interposition, - - - - 110
Courts of Equity may require parties to make suitable conveyances, - - - 112
they may direct compensation to party, who has made valuable improvements, - - 112
they can mould decrees, to administer such relief, as justice may require in each case, - 112
where legal title is disputed, plaintiff is sent to establish his right at law, - - - 111 *note*
partition may be made upon a legal or equitable title, - - - - - 111 *note*
a decree in partition does not affect the interests of third persons, - - - 111 *note*
on a bill for partition, the Court may decree a sale, - - - - - 111 *note*
tenants in common of personal estate, cannot have partition at law, - - - 112 *note*
in Ohio, a tenant in common, may work a division, by a conveyance by metes and bounds, but contrary to the general rule, - - 113 *note*

PARTNERSHIP.
proceedings at law between partners, - 114
Courts of Equity may decree the specific execution of an agreement, to form a partnership, or any of its stipulations, - - - 115
they may restrain one partner from the commission of any acts injurious to the partnership, - - - - - 115
they may dissolve a partnership for any sufficient cause, decree an account of its transactions, and wind up its business, - - 115
they will enforce contracts between partners, in reference to the common business, which would not be recognized at law, - - 115
partnership funds invested in real estate, for

Page.

PARTNERSHIP.

partnership purposes, treated in Equity as personalty, - - - - 116 and *note*
partnership property applied first to the satisfaction of partnership creditors, and separate property to individual creditors, - - 117
this doctrine not universally recognized, - 116 *note*
partnership debt a joint and several contract, 117
according to the modern doctrine, on the death of one partner, joint creditors may proceed in Equity against his separate estate, without alleging insolvency of the survivor, - - 117
rule which has prevailed in America, - 117 *note*
whether Equity will restrain the sheriff from selling the partnership effects on execution, to satisfy the debt of one partner, - - 117 118
debt of, not extinguished in Equity, by bond of individual partner, - - - 35 *note*

PARTIES.

who are necessary to a suit in Equity, - 395
consequences of an omission to make, - 395

PATENTS.

liberal principles which at present prevail in reference to, - - - - 161 *note*
all actions for infringement of, must be brought in the Federal Courts, - - - 161 *note*
the mere existence of a patent, no ground for issuing an injunction, - - - 162
there must be proof of an undisturbed possession, or user for a reasonable time, - - 162 *note*

PAYMENT OF MONEY INTO COURT.

when it will be directed, - - - 145

PENALTY.

See Damages liquidated,
See Forfeitures,
Courts of Equity will not permit a penalty to be exacted, where compensation can be made, 255
where the penalty was intended to secure the payment of money, they will grant relief on payment of principal and interest, - - 255
in other cases, they direct an issue to ascertain the amount of damages, - - - 256

Page.

PENALTY.
Courts of Equity will in some cases grant relief, beyond the amount of the penalty, - 256
this jurisdiction is exercised with caution, 254 *note*

PERFORMANCE.
See Specific Performance.

PERPETUATING TESTIMONY.
when a bill will lie for, - - - 299
the plaintiff must aver that the matter cannot be the subject of an immediate suit, - - 299
jurisdiction not favored, - - - 299

PRECEDENTS,
regarded in Equity as well as in law, - 17

PERSONAL ESTATE,
a primary fund for the payment of debts, - 92

POWER,
defects in the execution of, not going to the substance, relieved against in Equity, - - 40
distinction between non-execution and defective execution, discussed, - - 31 *note*
a power under a will to raise money from the rents and profits of an estate, to discharge a debt or portion, will authorize a sale, if that is the only mode of effecting testator's intention, 205
when a devise to executor passes an interest, and when only a power, - - - 202 *note*

PRINCIPAL AND AGENT,
nature of the relation, and duties consequent thereon, - - - - - 57
agent cannot become the secret vendor or purchaser of property, which he is authorized to buy or sell for his principal, - - - 57
See Agency.

PRINCIPAL AND SURETY,
any undue advantage taken of the latter by the creditor will invalidate the contract, - - 58
surety substituted to the place of creditor, - 59
surety released by any stipulations between creditor and debtor inconsistent with the terms of his contract, - - - 58 and 61 *note*

Page.

PRINCIPAL AND SURETY.
mere delay of creditor will not release him, 58
but binding stipulation for delay, or relinquishment of securities, will - - 58 and 61 *note*
engagement of surety only accessory, - - 59 *note*
contracts of surety, strictly construed, - 61 *note*
discussion of the question whether relation of principal and surety exists after judgment, - 59 *note*
surety may come into Equity, and compel principal to pay the debt, - - - - 58
or require creditor to proceed against him, 58 and 61 *note*
whether failure of creditor to proceed against principal, when directed, releases surety at law, 61 *note*
See Sureties.

PURCHASE,
when it is deemed a trust, - - - 253

PURCHASER, BONA FIDE,
Equity will lend no assistance in any proceeding, against a bona fide purchaser for a valuable consideration, without notice, - - 304
this protection will enure to the benefit of a sub-vendee, who is affected with notice, - 304
this defence applies to bills for discovery, as well as relief, - - - - 304
person making this defence must deny notice fully, positively, and precisely, - - 304 *note*
is no defenee to a legal title, - - 107 *note*
See Dower.

Q.

QUIA TIMET, BILLS OF,
object of, to prevent irreparable mischief, - 141
most usual modes of granting relief on, are by directing money to be paid into Court, or security to be given, appointing a receiver, or issuing an injunction, - - - - 141
See Receiver.
See Payment of Money into Court.

R.

RECEIVER,
who may be appointed, - - - 142 *note*
the object of appointing, is the preservation of property, the subject of litigation, or the rents

Page.

RECEIVER.
and profits thereof, from waste or destruction, 143
what is sufficient to authorize the appointment of, - - - - 143 and 142 *note*
where the defendant is in possession, under a legal title, will only be appointed in cases of fraud, or imminent danger, - - - 144
ordinary cases, in which a receiver will be appointed, - - - - - 142 *note*
a receiver will not be appointed of a subsisting partnership, except in a case of gross misconduct, - - - - - 143 *note*
duties and responsibilities of receiver, 144 and *note*

RECOMMENDATORY WORDS,
were formerly construed in almost all cases, as imperative, - - - - 206
the modern authorities give to the language of will, a more natural interpretation, - - 206

REFERENCE,
subjects of reference to a master, and nature of proceedings before him, - - 297 *note*

RELEASE,
of one joint debtor a release of all, a maxim of restricted application, - - - - 35 *note*
whether a debtor may stipulate for a release from his creditors as a condition of assignment. Conflicting decisions on this point, - - 64 *note*

RENTS AND PROFITS,
Equity will decree an account of, when the settlement is complicated and intricate, - 85
Equity considers an elegit as a mere security, and will compel the tenant under it, to account for the rents and profits actually received, - 85
Equity will not decree an account of mesne profits, unless there are some equitable circumstances, - - - - - - 85
illustrations of the interference of Equity in, 85
See Apportionment.
sometimes in matters of rent, from the number of the parties, and the necessity of an account, Equity takes jurisdiction, though there is a remedy at law, - - - - 80
where rent is due, and there is no remedy at law by distress or suit, Equity will grant relief, 119

Page.

S.

SATISFACTION,

definition of, - - - - - 212
what raises a question of, - - - 212
matter of presumption, which may be rebutted, 212
American cases on, - - - 212 *note*
disposition of the modern authorities against it, 213
rule, where a portion has been previously secured by a settlement, - - - 213
when the donee has received an advancement, since the execution of a will, - - 213
where the legatee is a creditor, - - 213
cases in which a legacy will not be deemed a satisfaction of a debt, classified, - - 215 *note*

SET OFF,

extent to which the right has been recognised in Equity, independent of statutory provisions, 285
nature of the right of set off, - - 284 *note*
Courts of Equity follow the law, unless there is some peculiar equity in the case, - 285
whether the insolvency of one party, will be sufficient to give the right of set off, - - 285 *note*
miscellaneous points connected with, - 287 *note*

SPECIFIC PERFORMANCE.

grounds of this jurisdiction, - - 124
is matter of discretion, and will not be decreed where it would work injustice, - - 124
when inadequacy of consideration will be a sufficient objection to a bill for, - - 124 *note*
of covenants for personal service, will not be enforced, - - - - - 125 *note*
of personal contracts will not be enforced, where damages would furnish an adequate compensation, - - - - - 126
of an agreement to execute a policy of insurance will be decreed, - - - 126 *note*
whether the specific performance of a covenant to build, will be decreed, - - 126
the remedy must be mutual, - - 127
it seems the better opinion, that the specific performance of a covenant by husband, that his wife shall execute a conveyance, will not be decreed, - - - - 127 and *note*

Page

SPECIFIC PERFORMANCE.

Courts of Equity may decree the specific performance of a contract, respecting land, situate abroad, - - - - - 127
the plaintiff will not be required to show a legal title to relief, - - - - 128
whether Courts of Equity may correct a written instrument, in cases of fraud, or mistake, and then decree its specific execution, - 128, 49
when specific performance will be decreed, where a party cannot literally fulfil the terms of his contract, - - - - 128
effect of purchase, with notice of defect in title, 128 *note*
distinction between the application for a specific execution by vendor, and by vendee, where former cannot convey the whole land, - 128 *note*
time is not usually regarded as the essence of a contract, - - - - - 130
but it may become so, by agreement of the parties, or by the nature of the contract, 130 and *note*
provisions of the Statute of Frauds, as to contracts respecting land, - - - 130
sales at auction are within the statute, - 131 *note*
what is a sufficient memorandum of the contract in such sale, - - - - 131 *note*
but sales before a master are not embraced under, - - - - - 131 *note*
what is sufficient to take a case in Equity, out of the operation of the statute, - - 131
what amounts to a part performance, - 132
Courts of Equity will enforce a parol promise, which has been the means of depriving another of an intended legacy, - - - 133
they will not enforce the performance of a contract, founded on no valuable or meritorious consideration, - - - - 134
specific performance will be decreed, not only the application of the parties themselves, but on their privies in estate or representation, - 134

SURPRISE,

a ground of relief in Equity, - - 38

Page

SURETY,
Equity will correct a mistake in a written instrument, against, - - - 41 *note*
See Principal and Surety.
See Contribution.

T.

TACKING.
in England, a junior mortgagee by purchasing an antecedent incumbrance may unite the securities, and *squeeze out* an intermediate mortgagee, - - - - - - 69
this doctrine very generally exploded in the United States, as inconsistent with the policy of our registry acts, - - - - 70

TERMS FOR YEARS,
origin and uses of, - - - - 182
have never existed in this country, as in England, - - - - - 183 *note*

TESTIMONY, DE BENE ESSE,
when a bill to take may be filed, - - 300

TRUSTEES,
cannot use the trust for their own advantage, 57
the powers of trustees over trust property, - 174
the trustee does not hold the estate for his own benefit, - - - - - 174
has in general no right to change the nature of the estate, - - - - - 174
is not entitled by the English rule to remuneration, - - - - - 245
a more liberal policy generally prevails in the United States, - - - - 245 *note*
duties in reference to trust property, - - 246
must not invest trust money upon personal security, - - - - - 247
treated with liberality, so long as they act in good faith, - - - - - 247
under what circumstances trustee will be required to pay interest on trust fund, - - 247 *note*
when and how far joint-trustees responsible for each other, - - - - - 248
rules in reference to trustees less stringent, than in reference to executors, - - 249

Page.

TRUSTEES,

how far one executor is responsible for a devastavit of another, - - - 249 *note*
how far one guardian liable for another, - 249 *note*
a state may be a trustee, - - - 174 *note*
directors of a corporation, are trustees for the company, - - - - - 174 *note*

TRUSTS,

definition of, - - - - 169
exclusively recognised in Courts of Equity, - 169
difference between express and implied trusts, 170
between executed and executory trusts, - 170 *note*
express trusts are included within the provisions of the Statute of Frauds, - - 170
but not resulting trusts, - - - 231 *note*
the ordinary incidents of property attach to trust estates, - - - - 172
the maxim *aequitas sequitur legem* prevails, 173
whether trust estates escheat for felony or want of heirs, - - - - - 172 *note*
what is essential to create a trust, - - 173
a trust will not be permitted to fail for want of a trustee, - - - - - 173
where an instrument declares both legal and illegal trusts, if the former can be separated from the latter, they will be sustained, - 174 *note*
when the law will raise an implied trust, on an instrument creating an express trust, - - 232
when a conveyance without consideration will create a trust, - - - - 233
where one man purchases an estate with the money of another, but takes the conveyance in his own name, the law raises a trust for the benefit of the former, - - - 233
this trust must arise at the time of the conveyance, - - - - - 233 *note*
parol evidence seems admissible to prove a resulting trust, after the death of the nominal purchaser, where the deed acknowledges payment by him of the consideration money, - 234
the law does not raise this trust, where the real purchaser is an alien, - - - 234
or where a father buys an estate in the name

Page.

TRUSTS,
of his son, or a husband in the name of his wife, - - - - - - 235
See Advancement.
the executor in this country is generally a trustee for the next of kin, of the residuum of the personal estate, - - - - 99, 235
See Conversion of Property.
Courts of Equity have receded from the extravagant length, to which they formerly went in raising an implied trust from recommendatory words in a will, - - - - 206
See Lien.
the possession of trust property, unless in the hands of an innocent purchaser, will raise a trust, - - - - - - 241
See Corporations.
this rule will be applied most stringently where a party comes into the possession of trust property fraudulently, - - - - 244
rights of the cestui que trust, where trustee has changed character of the trust property, - 244 *note*
cases in which Equity will enforce a trust in reference to property situate abroad, - - 251

V.

VENDOR,
See Specific Performance, Trusts, Liens.

VOLUNTARY CONVEYANCES,
when deemed fraudulent, - - - 62

W.

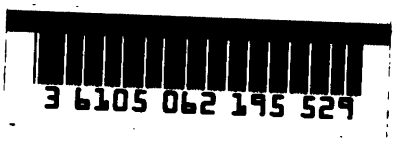
WASTE,
where an injunction is asked to stay future waste, or a discovery is sought, Equity will decree an account, - - - - - 86
See Injunctions.

WILLS,
Equity will correct mistake apparent on the face of, - - - - - 40
parol evidence only admissible to remove a *latent ambiguity* in, - - - - 40

Page.

WILLS,

trusts created by, subjects of equitable cognisance, - - - - - - 202
distinction between the jurisdiction over, at law and in Equity, - - - - - 202 *note*
principles of construction applied to, - 203 *note*
bequests of personalty construed more liberally in Equity, than devises of reality at law, 205
often necessary to resort to Equity, to ascertain the persons to take under general descriptive words, - - - - - - 204
Courts of Equity have no direct authority to determine the validity of a will, but must refer it to the common law, or Ecclesiastical tribunals, - - - - - - - 288
may establish a will, which has been suppressed fraudulently, - - - - 288
or where it has been sufficiently established by a trial at law, grant an injunction to restrain any future litigation, - - - - 289
distinction between the verdict of a jury, on a will of real estate, and the sentence of the Ecclesiastical Courts, in a will of personalty, - 289 *note*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